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Mining Rights

ON THE PUBLIC DOMAIN

Lode and Placer Claims

TUNNELS, MILL SITES AND WATER RIGHTS

Statutes, Decisions, Forms and Land Office Procedure

FOR PROSPECTORS, ATTORNEYS, SURVEYORS AND MINING COMPANIES

BY R. S. MORRISON AND EMILIO D. DE SOTO
OF THE COLORADO BAR

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EDWIN J. COLLINS.

MINING RIGHTS

DISTRICT RULES.

The origin of Mining Districts and of their Rules was in the mining camps of California, in 1849, before any territorial form of government had been established, and the same system was followed and prevailed wherever valuable discoveries in other sections induced an influx of prospectors.

Practically all the Pacific slope and the land east of the mountains to the Missouri river was then public domain. The vast ore bodies of the Comstock, the wealth of Alder Gulch, the veins and placers of Pike's Peak, and of countless intermediate mineral localities were all appropriated and their values extracted under the protection of this form of local self-government for many years, with no paternal interference by the National Legislature.

Each local camp called itself a Mining District as defined by the action of a mass meeting of the miners. Some of them were less than a mile square, others quite extensive, and they have become permanent geographical divisions for purpose of description in the conveyance of real estate of all kinds in the mining counties.

After defining the name and local extent of the District these meetings usually designated certain officials to be elected from time to time, and

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CONTRACTIONS.

A. C.—Act of Congress.
F.—Federal Reporter.
L. D.—Land Decisions of the Interior Department.
M. R.—Morrison's Mining Reports. (Vols. 1-22.)
P.—Pacific Reporter.
R. S.—Revised Statutes of the United States.
R. S. Colo.—Revised Statutes of Colorado (1908).

then proceeded to adopt rules regulating the size of claims, prerequisites of location and for annual labor or periodical representation in some form.

Before the territorial organizations were complete, and while the diggings were remote from organized society, they often took a much wider scope and provisions were made for executive officers, for miners' courts, and covering all sorts of subjects. But these incidents have long since ceased.

Where the districts, as quasi municipal organizations, have been abandoned, provision has generally been made to preserve their records in the County Recorder's office.

With almost no interference by State or Territorial Acts they were the mining laws of the land until the Act of Congress of July 26, 1866. This but slightly limited their authority, but the Act of May 10, 1872, covered so many essential incidents, and has been so supplemented by State and Territorial legislation, that they have been gradually abandoned, and survive now only as a name of description.

Only in California, Utah and Alaska are the organizations still preserved to any extent. Where not extinct their existence is practically confined to the keeping of district records for the registry of locations, with regulations defining the size of claims and details of location. Undoubtedly where there is no State or Territorial Statute a district can yet be organized, and details of location fixed by its rules, but any attempt to revive old districts or enact new district rules in any State or Territory which has any pretense of a mining code would only tend to confusion.

The details of these rules were not altogether arbitrary or experimental. In many respects they followed precedents already long established in Spain and Mexico. The requirements of discovery and discovery shaft, of sinking and record, periodical labor, forfeiture for non-representation, and many others, are duplicates, more or less close, of like provisions of the Royal Code of 1783, but enacted by these local conventions of practical miners

in entire ignorance of the existence of such code. —*Rockwell's Sp. & Mex. Laws, 25.*

For instances of the form and contents of District Rules see 11th edition, p. 5.

The rules under which the Comstock lode was located are printed in *Kinney v. Cons. Va. Co. 10 M. R. 467; 4 Saw. 382.*

Unorganized Districts.

A mining title may be proved without either district organization or proof of district rules.—*Golden Fleece Co. v. Cable Co. 1 M. R. 120; 12 Nev. 312.*

Where land office or other forms contain a blank for the name of the mining district, and no district has ever been formed, it is usual to fill such blank with the word "Unorganized." And there is no doubt that a mining district may exist to the extent of giving a name to a locality and limited to that extent, and such name, when adopted by common consent, is as valid as if adopted at a district meeting.

The term mining district has a well known meaning while the term mineral district is only a vague and indefinite generalization.—*U. S. v. Smith, 11 F. 487.*

New Districts in Alaska.

The Alaska Act (*post* ALASKA), recognizes old district organizations, provides for new ones and contemplates the passage of district rules. Upon the organization of a district the minutes of first meeting should show that it was called by public notice and attended by a majority of the miners either personally or by representation; should define boundaries; elect permanent Chairman and Recorder; restrict size of placer claims in crowded diggings, leave lode claims to the full size allowed by the Act of Congress, and make special provision for the keeping of permanent and accessible records.

Judicial Decisions as to District Rules.

Where in ejectment for a mining claim the plaintiff has described the same as located under district rules, he may recover without proof of the existence of such rules by evidence of his prior possession and the entry of defendant; but if his *prima facie* case on possession is negatived by any title proved by defendant he must then show the existence of the district rules and his compliance therewith before he can introduce his location or record made under such rules.—*Sears v. Taylor, 5 M. R. 318; 4 Colo. 38.*

Courts will not inquire into the regularity of the mode by which district rules have been enacted, except upon allegation of fraud, or other like cause.—*Gore v. McBrayer, 1 M. R. 645; 18 Cal. 583.*

Where the evidence renders it doubtful whether the written laws of the district are in force, both the written laws and parol proof of the mining customs may be offered in evidence.—*Colman v. Clements, 5 M. R. 247; 23 Cal. 245.*

District Records.

A district record kept in a pocket diary is no record.—*Fuller v. Harris, 29 F. 814.* A district recorder can not appoint a deputy.—*Van Buren v. McKinley, 66 P. 936.*

Once proved to exist are presumed to continue.—*Riborado v. Quang Pang M. Co. 6 P. 125.*

The land office, in patent applications, has the power to decide what rules are in force.—*Parleys Park Co. v. Kerr, 130 U. S. 256.*

A mining regulation can not restrict the number of claims which a party may hold by purchase.—*Prosser v. Parks, 4 M. R. 452; 18 Cal. 47.*

A district rule can not limit the size of a claim duly located before such rule was adopted.—*Table Mt. Co. v. Stranahan, 9 M. R. 465; 21 Cal. 548.*

A right to hold a claim may be forfeited by failure to comply with the district rules.—*St. John v. Kidd, 4 M. R. 454; 26 Cal. 264.* But not unless the rule itself so expressly provides.—*Bell v. Bed Rock*

Co. 1 M. R. 45; 36 Cal. 214; Emerson v. McWhirter, 65 P. 1036. See *Yosemite Co. v. Emerson, 28 S. C. R., 196.*

A valid district rule may exist and be proved, although not found among other written rules of the district.—*Harvey v. Ryan, 4 M. R. 490; 42 Cal. 626.*

A custom, reasonable in itself, and generally observed, will prevail against a written mining regulation which has fallen into disuse.—*Id.* The existence of a district mining law is a question of fact for the jury.—*Id.*

Effect of Mining Codes.

Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, North and South Dakota, Oregon, Washington and Wyoming have adopted more or less complete mining codes. In California, Utah and Alaska much more is left to the control of the district organizations, but the inclination in all is toward statutory regulations and on whatever point the statute is made to cover the authority of the district rules ceases, except as to rights already vested. The tendency is thus to their ultimate extinction. See STATUTORY REQUIREMENTS and RECORD.

CONGRESSIONAL RECOGNITION OF MINERS' RIGHTS.

License to Appropriate the Public Domain.

R. S. Sec. 910.—No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.—*Sec. 9, A. C. Feb. 27, 1865.*

License Under Congressional Act of 1866.

Sec. 1.—The mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens

of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.—*July 26, 1866. Repealed May 10, 1872.*

License Under Present Congressional Law.

R. S. Sec. 2319.—All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.—*Sec. 1, A. C. May 10, 1872.*

Section 910 contains the first Congressional recognition of the fact that the mineral lands of the United States were being appropriated by its citizens.

From the time, however, of the discovery of gold in California, the government had tacitly recognized the occupation of its mining lands as such, and withheld them from survey and pre-emption.

Judicial Recognition.

The judiciary of California and all the States and Territories on the Pacific slope had recognized the "Miners' Title" as property entitled to protection, and they were followed by the Supreme Court of the United States to the same effect.—*Sparrow v. Strong, 2 M. R. 320; 3 Wall. 97; Forbes v. Gracey, 14 M. R. 183; 94 U. S. 762.*

Consecutive Acts of '66, '70 and '72.

In 1866 the first Act was passed looking to the absolute disposition of mineral veins. In 1870 a supplemental Act was passed embracing placers. In 1872 these Acts were revised and the Act of Congress of May 10 of that year, found in Chapter 6, Title 32 of the Revised Statutes of the United States, is, with slight change, the Congressional law still in force.

LEGAL STATUS OF POSSESSORY CLAIMS.

The National Government the Source of Title.

By proper expressions in the Organic Act of each Territory or the Enabling Act of each State, the ownership of the United States in the public domain is declared as fundamental law. The attempt once made in California to assert a State ownership in mines, *Hicks v. Bell, 3 Cal. 219*, has long ago been abandoned.—*Moore v. Smaw, 12 M. R. 429; 17 Cal. 199.* The title to all lands in the French and Mexican cessions is, in the first instance, in the United States of America, excepting grants made by the old governments prior to the treaties. These cessions include all land west of the Mississippi River except the old Territory of Oregon.

The fee simple thus remaining in the government, all citizens, or persons who have declared their intention to become citizens, are allowed to enter upon the unappropriated public domain and acquire title to mineral lands by complying with certain regulations intended to preserve the peace and protect the first occupant.

Before the passage of Acts of Congress to this effect, the assertion of claims to mines by discoverers had been recognized by district rules, local statutes and decisions of courts. But ever since 1866 the matter has been regulated by specific Acts of Congress, supplemented by district rules and local legislation concerning the details of location and the manner of perfecting title.

Whether a Vested Estate.

That a possessory mining claim is a vested estate, is no longer debatable. It is "property in the highest sense of that term." Its legal status is clearly and learnedly stated by GILBERT, J., in *O'Connell v. Pinnacle Co. 140 F. 854.* This opinion, as well as the decision which it affirms (*131 F. 106*), gives the distinction between such a mining title and a pos-

sessory pre-emption or homestead title in cases of descent before patent.

The Miner Holds a Qualified Title dependent upon possession and maintained by compliance with local directions. He is not compelled to advance to patent nor to pay for the use of the land, but his holding is of the same legal class as a homestead or pre-emption and is in anticipation of an ultimate entry and patent. His title is not absolute in a technical sense, nor secure in a practical sense, until he gets the fee simple title by such proceedings.

Abandonment.

Such an estate, dependent upon possession, is conversely one which may be lost by abandonment. —*Merritt v. Judd, 6 M. R. 62; 14 Cal. 59; Mallett v. Uncle Sam Co. 1 M. R. 18; 1 Nev. 188.*

Is a Freehold.

That is to say, an estate which passes to the heirs.—*Harris v. Equator Co. 12 M. R. 178; 8 F. 863; White Star Co. v. Hultberg, 77 N E. 327; McFeters v. Pierson, 15 Colo. 201; Keeler v. Trueman, Id. 143.*

Is Real Estate.

The miner's claim or title is real estate as distinguished from chattel or personal property and is conveyed, sued for, descends, is devisable and is treated in other respects as the real property of the occupant, subject only to the paramount title of the United States.—*Roseville Co. v. Iowa Gulch Co. 16 M. R. 93; 15 Colo. 29; Butte Co. v. Frank, 21 M. R. 368; 65 P. 1; Bakersfield Co. v. Kern County, 77 P. 892; Bradford v. Morrison, 86 P. 6.*

But in Oregon and Washington they have been held to be personal property.—*Herron v. Eagle Co. 61 P. 417; Phoenix Co. v. Scott, 54 P. 777.* In the former state they are now declared to be real estate by statute.

The Distinctions Between Mining Claims and Other Classes of Realty are substantially those arising out of the following incidents:

1. The title being first acquired by possession, it may be lost by acts amounting to a discontinuance of possession; that is by abandonment.

2. Annual labor upon each claim is required by Act of Congress as a condition upon the non-performance of which the same consequences result as in the case of a technical abandonment; that is, the ground becomes open to the entry of the next occupant.

3. The formula of notice and recording, and the method of initiating title are subject to regulation by the State, Territory or Mining District, in details not covered by the Acts of Congress.

4. Special modes of assessment and collection of taxes are or have been attempted; but distinctions of this sort have generally been found impracticable.

5. There are statutes to prevent forcible dispossession of claimants, to allow of underground surveys and inspection and to regulate drainage.

6. The mode of perfecting patent in the U. S. Land Office is wholly different from that regulating pre-emption or homestead entries upon agricultural lands.

SCHOOL CLAIMS.

Fully one-half of all the sections of the old Colorado Statutes on the subject of mines was taken up by a persistent attempt to force a "School Claim" on each location. The whole effort was in violation of the Organic Act, and has been held absolutely null and void as well by the courts as by the land office, and repudiated by the miners as an attempt to put the whole cost of schools on a class of men who, as a rule, were not persons with families.

By Act of 1862, claim No. 3, east or west, was to be set apart for schools; by Act of 1866, one side

claim on each end of the discovery claim of 1,400 feet was to be recorded—100 feet for schools and 100 feet for disabled miners.

SOLDIERS' CLAIMS.

By Territorial Acts passed in instances during the civil war, claims belonging to soldiers were protected from forfeiture during enlistment and for a reasonable time thereafter; they were also allowed to locate and record claims by proxy; and their titles were protected from sale on execution during their absence.

During the Spanish war Congress passed an act, approved July 2, 1898, relieving volunteers from performance of annual labor during their term of service. It required the record of a notice stating the fact of enlistment and of "His desire to hold said claim under this Act."—*30 St. L. 651; Mining Rights 11th Ed. 16.* A notice filed under this Act was considered in *Field v. Tanner, 75 P. 916.*

Co-owners with such volunteers were required to do their proportion of the work, and in default of such labor their interest might be forfeited to any person who entered and did such work during the ensuing year.

LENGTH OF LODE CLAIM LOCATED BEFORE MAY 10, 1872.

3,000-Foot Act of Congress of 1866.

Sec. 4. * * * No location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules. *And provided further,* That no person may make more than one location on the same lode, and not more than three thousand feet

shall be taken in any one claim by any association of persons.—*July 26, 1866. Repealed May 10, 1872.*

Before the Act of Congress of 1866 the length of lode claims was regulated either by district rules or by State or Territorial legislation. It was by no means uniform. Short lengths of 100 or 200 feet, sometimes as low as fifty feet or less, were the limitations under the older district rules. In later years the tendency was to allow longer claims. In Colorado the statute fixed the length of a claim in 1861 at 100 feet. In 1866 at 1,400 feet. The Act of Congress of 1866 allowed 400 feet to the discoverer and a claim of 200 feet to each associate locator, not exceeding 3,000 feet on the lode under one location.

Associates and Side Claims.

It is impossible to understand the limitations on the size of claims without considering a certain custom which originated in the earliest mining camps of California, and became a general practice over the western slope. With slight local modifications this custom was for the discoverer to record a notice that he claimed 50, 100 or 200 feet, as the case might be, on a certain lode. On the same paper, or by a separate paper signed later, other parties, real or nominal associates of the discoverer, would give notice of claim to No. 1 East, No. 1 West, etc., on the same lode. Not only would the associates of the discoverer make such records, but often third parties, without even going on the ground, would file on these side claims —in instances to the extent of several thousand feet on each side from the discovery claim.

Joint Records.

In other districts the discoverer and his associates would file on the discovery claim, No. 1 East, No. 1 West, No. 2 West, etc., indefinitely by a joint location certificate, not attempting to segregate the feet claimed by one from the feet claimed by the other.

Record Without Location Work.

These side claims, whether taken separately or as one joint location, were supposed to be at least staked off on the ground, but no discovery hole was required, and, in fact, in most cases, only the paper record was made and the claims seldom pursued further, unless developments on the discovery claim seemed to indicate that the side claims might be of value. Such was not the original intention of the miners, but the custom degenerated to this, and the records of thousands of such claims remain, whose owners never did any work upon, nor ever knew the exact situation of their claims.

Nominal Associates Conveying to Discoverer.

This privilege to locate side claims was soon taken advantage of by the discoverer, who procured nominal parties to record, and immediately after recording to convey their claims to him, and as soon as the Act of Congress, 1866, was passed, such became the universal practice, the custom as it already existed being altered only in this: That the claims were no longer numbered, but were taken together as a joint location by a supposed association of fourteen persons, taking fifteen claims of 200 feet each, or 3,000 feet in all—the discoverer being allowed one additional claim. Further, after the passage of such Act, the staking of the lode into its several claims was abandoned altogether. Before the Act each locator usually recorded one specific claim, in which the other locators had no interest, nor he in theirs, but after the Act, the record almost always showed a joint location of undivided claims.

Validity of Such Nominal Records.

It is more than doubtful whether at any time, as against an adverse *bona fide* claim, such nominal side claims were by the record alone, of any validity, unless actually possessed and defined upon the ground in some manner; *Cons. Rep. Co. v. Lebanon Co. 15 M. R. 490; 9 Colo. 343; Becker v. Pugh, 15 M. R. 304;*

9 Colo. 589; Hess v. Winder, 12 M. R. 217; 30 Cal. 349; but the practice of the Land Office is to patent such claims without inquiry, if sufficient development for patent has been done on any one of them, or on the discovery.

Length of Lode Claim at Various Dates in Colorado.

1. Prior to Nov. 7, 1861, the length of a lode claim was fixed by district rules.

2. From Nov. 7, 1861, to March 11, 1864, the length of a claim was 100 feet, but an indefinite number of claims could be based on a single discovery.

3. From March 11, 1864, to Feb. 9, 1866, 100 feet was the length of a claim, and sixteen claims of that length could be based on a single discovery.

4. From Feb. 9, 1866, to July 26, 1866, 1,400 feet was the length of a claim and the limit of a location.

5. From July 26, 1866, to Feb. 11, 1870, 200 feet was the length of a claim and 1,400 feet could be taken under one location.

6. From Feb. 11, 1870, to May 10, 1872, 200 feet was the length of a claim and 3,000 feet could be taken under one location.

7. Since May 10, 1872, 1,500 feet is the length of a claim.

LENGTH OF LODE CLAIM SINCE MAY 10, 1872.

Not to Exceed 1,500 Feet.

R. S. Sec. 2320.—Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; * * * —*Sec. 2, May 10, 1872.*

Since May 10, 1872, 1,500 Feet has been the well-known limit of a lode. This number of feet constitutes one undivided claim, or one lode as the word

is commonly used—that is, so much of a vein as is covered by one location based upon a single discovery—and in practice so much of one vein as is known by a single name and covered by a single record. The length of 1,500 feet is the uniform length wherever the mining acts are in force. A State Statute could not shorten this length in opposition to the positive permission of the Act of Congress above printed. It is the length almost invariably expressed in the location certificate and is rarely shortened except where only a fraction of clear ground remains to be taken up.

Length—How Distributed.

This length, by common usage, is taken 750 feet on each side of center of discovery; but it may be taken all on one side except enough to include the discovery shaft itself, or it may be distributed in any desired proportion from the center of the discovery shaft.

Location of Excessive Length.

The import of the decisions on this point seems to be that an inadvertent over-stepping of the legal length or width will not avoid the claim; *Richmond Co. v. Rose, 114 U. S. 576; Burke v. McDonald, 17 M. R. 325; 33 P. 49; Hanson v. Fletcher, 37 P. 480; McElligott v. Krogh, 90 P. 823;* but that the claim as to the excess is void; *Hauswirth v. Butcher, 4 Mont. 299; Gohres v. Illinois Co. 67 P. 666; McPherson v. Julius, 95 N. W. 428;* and that a gross excess (1,763 instead of 1,500 feet) made without excuse will defeat the whole location.—*Leggatt v. Stewart, 15 M. R. 358; 5 Mont. 107.*

An excess staking in length or width does not invalidate, except as to the excess, when made without fraud (in this case by stepping the lines) and the mistake has been corrected before the rights of third parties attached.—*Stem-Winder Co. v. Emma Co. 21 P. 1040.*

But where the excess was such that the end stakes could not be found on search within several hundred feet the location is not valid.—*Ledoux v. Forester, 94 F. 600.*

WIDTH OF LODE CLAIM LOCATED BEFORE MAY 10, 1872.

Indefinite Under A. C. 1866.

Sec. 4.—No location hereafter made shall exceed two hundred feet * * * * * * together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules.—*July 26, 1866. Repealed May 10, 1872.*

Colorado 50-Foot Act of 1866.

Sec. 4. On all mineral lodes or veins of gold-bearing ores, or of silver or other valuable minerals in this Territory, the owner or owners of all such deposits shall, by virtue of priority of discovery, be deemed and held to be the owner or owners of all spurs, off-shoots, dips, angles, feeders, cross or parallel veins of any character or name whatsoever, lying and being within the limits of twenty-five feet in either direction from the center of said first discovered lode or vein.—*Feb. 9, 1866.*

The district rules usually allowed a surface width of fifty feet; sometimes more, often less. The Act of February 9, 1866, made twenty-five feet on each side of the center of the vein the width of the claim by implication only, and yet was generally construed as restricting width of claims throughout Colorado; and this was the only mention of the subject in the Colorado Statutes prior to 1874.

The A. C. 1866 allowed a "reasonable quantity" of surface, but the Territorial Statute of the same year was taken as fixing the amount as above stated, at fifty feet.

In the other States and Territories the width was almost invariably, as it still is in some of them, fixed by district regulation alone, without reference to the subject by the legislature.—*Parley's Park Co. v. Kerr, 17 M. R. 201; 130 U. S. 256.*

Prior to the Act of Congress of 1872, the width of claims had been considered merely as a question of sufficient surface for convenient working.

WIDTH OF LODE CLAIM SINCE MAY 10, 1872.

Limits Allowed by Present U. S. Law.

R. S. Sec. 2320. * * * No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other.—*Sec. 2, May 10, 1872.*

Present Width Fixed by Colorado Statute.

R. S. Colo. Sec. 4193.—The width of lode claims hereafter located in Gilpin, Clear Creek, Boulder and Summit counties, shall be seventy-five feet on each side of the center of the vein or crevice; and in all other counties the width of the same shall be one hundred and fifty feet on each side of the center of the vein or crevice: *Provided,* That hereafter any county may, at any general election, determine upon a greater width not exceeding three hundred feet on each side of the center of the vein or lode, by a majority of the legal votes cast at said election, and any county by such vote at such election may determine upon a less width than above specified.—*Feb. 13, 1874. In force June 15, 1874.*

Between May, 1872, and June, 1874.

Between May 10, 1872, when the Congressional section in regard to width was passed, and June 15, 1874, when the Colorado Act took effect, the width of all lode claims remained fixed at fifty feet under the Territorial Act of *1866,* printed on *page 17.*

Colorado, 300 Feet Except in Certain Counties.

The A. C. of 1872, having allowed to the locator all the veins within the side lines of his claim, gave at once to the question of width an importance before unknown. The Legislature having in their

power to choose between the extreme width of 600 feet and the minimum width of fifty feet, a great difference of opinion resulted in that State, citizens of the older mining counties generally contending for a narrow width, while in the new districts the greater width was desired; after great debate it was fixed at 150 feet for Gilpin, Clear Creek, Boulder and Summit counties, and at 300 feet in all other counties.

No instance is known to the author of any attempt in any county, to change the width by an election held under the proviso above printed and the constitutionality of any such proceeding, if attempted, would admit of very great doubt.

All the Other States and Territories allow the full limit of 600 feet width, except where the district rules fix a narrower limit, which they rarely now purport to do; and except also North Dakota, which fixes the width at 300 feet, allowing counties to increase or decrease it within the Congressional limit.

Center of Vein, Center of Claim.

It will be observed that the center of the lode is made the center of this width. If, therefore, a party attempt to locate more than half the extreme width on either side of his vein, the location of such excess is without the authority of law, although the entire width be within the statutory limit.—*Taylor v. Parenteau, 23 Colo. 368.*

By Statute, in Wyoming, the discovery shaft must be equi-distant from the side lines of the claim.

Location of Excessive Width.

The Surveyor-General will not issue an order for survey for patent upon a location certificate which claims, in terms, on its face, more than the total width allowed or with an excess of more than one-half of the legal width on either side of the center of the discovery vein, and it is doubtful whether any court would receive such certificate in evidence.

Such mistakes are the work of surveyors who undertake to put their field notes into the form of a location certificate in total ignorance of what constitutes a valid location certificate. This document should be drawn by a competent attorney.

But there is nothing to prevent a location of one-half the statutory width on one side the center of the vein and *less* than one-half on the other side of such center line.

A location of excessive width is not void and a second location can not on such pretense take in the actual workings of the first party.—*McIntosh v. Price, 121 F. 716.*

Where the lines were in zigzag form, thus making excessive width, the department required an amended survey.—*34 L. D. 470.*

Excess by Vein Approaching Side Line.

It is true that it may not be known when the stakes are set what the course of the lode may be, and honest errors in this respect may readily be committed; but the vein being the basis of location, and it having been decided that when a vein leaves the side lines of its location, the claim both as to veins and surface beyond that point is void, it necessarily follows, where either side line is found at any point to be more than the legal distance from the center of the vein, that the location of such excess in width has not been based upon a vein lying within the statutory limits, and comes within the same reasoning which renders all that portion of the location void in which no vein is found.—*Patterson v. Hitchcock, 5 M. R. 542.* But no such fact would vitiate any part of the claim after patent issued.—*Peabody Co. v. Gold Hill Co. 97 F. 657.*

Excess—How Corrected.

The case of *McElligott v. Krogh, 90 P. 823*, serves to illustrate the above diagram and shows at the same time how the error is to be corrected and new lines established. Upon development after location the discovery vein of the Live Oak lode claim was found to run in such direction that its N. W. corner was 320 feet from the "middle of the vein," that is to say 20 feet beyond the point at which it could legally be placed. The appellant Court reset this corner by drawing it in 20 feet toward the vein and fixed the west side line, by drawing a straight line from the new corner to the point on the original west side line where the excess first began; allowing the original west side line to stand from that point to the S. W. corner which was within the 300 feet. *See diagram, 90 P. 824.*

The above diagram illustrates the preceding paragraph. The shaded ground shows an excess over the allowed 300 feet from the center of the vein. A valid hostile discovery could be made upon such shaded ground or a location made taking it in. The plat shows a claim of 600 feet width. Where the full legal width is 300 feet, the excess would begin, of course, at 150 feet "from the center of the vein."

DISCOVERY AND LOCATION OF LODES BEFORE THE ACTS NOW IN FORCE.

Mode of Location Not Strict.

Prior to 1866 there was no United States law regulating lode locations. Nor did that law state any definite formula further than to limit the extreme width and length. Nor were the requirements of the State or Territorial Legislatures usually specific. Either by statute or by district rule a discovery was always required and a notice at the point of discovery, and in many districts such a staking as would indicate the extreme points to which the claim extended. In 1866 by statute in Colorado a location stake and a ten foot discovery shaft were required. In other States and Territories even these initial and essential points were left entirely to district regulations.

In all cases the actual disclosure of the vein, and not merely the float or indication of the vein, was required, and the stake was supposed to give the name of the lode and its locator, with usually the date of discovery and the number of feet in each direction.

That some act of location was required, has never been disputed. But in the absence of district rules, what would amount to a sufficient location can only be defined as such acts of appropriation as would amount to a declaration that the locator had appropriated the ground, and be sufficient notice to other prospectors that he had so appropriated it.—*Hess v. Winder, 12 M. R. 217; 30 Cal. 349; English v. Johnson, 12 M. R. 203; 17 Cal. 107; Attwood v. Fricot, 2 M. R. 305; 17 Cal. 38; Gleeson v. Martin White Co. 9 M. R. 429; 13 Nev. 442; Gonu v. Russell, 12 M. R. 630; 3 Mont. 358.*

In the case of *Cons. Rep. Co. v. Lebanon Co. 15 M. R. 490; 9 Colo. 343*, it was ruled that the posting of the notice and the recording of certificate not followed by development or representation, would not

hold the claim against a subsequent location. See also *Becker v. Pugh, 15 M. R. 304; 9 Colo. 589.*

DISCOVERY AND LOCATION UNDER LAWS NOW IN FORCE.

Discovery Required.

R. S. Sec. 2320. * * * No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * * —*Sec. 2, A. C. May 10, 1872.*

Staking and Record.

R. S. Sec. 2324.—The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. * * * —*Sec. 5, A. C. May 10, 1872.*

Discovery Shaft, Notice and Stakes in Colorado.

R. S. Colo. Sec. 4197.—Before filing such location certificate the discoverer shall locate his claim by:

First—Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well defined crevice.

Second—By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery.

Third—By marking the surface boundaries of the claim.—*Feb. 13, 1874.*

Corner Posts, Center Posts.

R. S. Colo. Sec. 4198.—Such surface boundaries shall be marked by six substantial posts hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to-wit; one at each corner and one at the center of each side line. Where it is practically impossible on account of bed rock to sink such posts, they may be placed in a pile of stones, and where in marking the surface boundaries of a claim any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb,

it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place.—*Feb. 2, 1876.*

Open Cuts and Tunnel Discoveries.

R. S. Colo. Sec. 4199.—Any open cut, cross-cut or tunnel which shall cut a lode at a depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft. —*Feb. 13, 1874.*

Time to Sink Discovery.

R. S. Colo. Sec. 4200.—The discoverer shall have sixty days from the time of uncovering or disclosing a lode to sink a discovery shaft thereon.—*Id.*

The Doctrine of Appropriation would have no application to mining and water claims on the Pacific Slope if the lands, before the discovery of minerals, had passed into the hands of private owners; nor to the government itself, if the government had chosen either to treat the miners as trespassers or to arbitrarily dispose of the lands at public sale. Instead of adopting any such policy, the United States for many years tacitly, and since 1866 by positive enactment, opened the lands to the explorer and occupant; in other words, the mineral lands were offered to the first appropriator.

The Acts of Appropriation, as to mineral lands, are equivalent to such acts as would amount to occupation in other cases; there must be an intent to possess the claim, such acts of appropriation as are sufficient to carry out this intention, and finally such acts must have such publicity by record as to operate as notice to all, that the lands have been actually appropriated.

The appropriation of a mine, the appropriation of water for mining or irrigating purposes, and the occupation of homestead land are therefore in substance the same, and differ only so far as the various subject matters differ, the criterion in each case being the intent of the occupant to segregate a cer-

tain portion of the public domain to his several use, followed by acts manifesting such intention with such publicity as is due to the rights of third parties. —*Sparrow v. Strong, 2 M. R. 320; 3 Wall. 97; Gore v. McBrayer, 1 M. R. 645; 18 Cal. 583.*

The Right of Appropriation is now regulated by statute to a greater or less extent in most of the States and Territories, so that the appropriator must not only occupy the ground, but must segregate his claim and otherwise comply with the law, which attempts to reduce to detail the above general principles.

These statutes fix a time for the process of location and record and require certain acts to be done to constitute a valid location. In all the Western mining States and Territories, except California, Utah and Alaska, the regulations are quite specific. They have copied the earlier Colorado Statute more or less closely. In the excepted States much more is left to district custom. It is intended that a location made as in this chapter advised would be valid in any State or Territory, except where some specific statute calls for additional requirements: The details of location in each State and Territory are tabulated on *page 60.*

Where Location Begins and Ends.

It has been held that the word location does not necessarily include discovery. That a stipulation that certain lodes were "located in compliance with law" did not preclude an attack on the discovery. *Uinta Co. v. Ajax Co. 141 F. 563.*

The Supreme Court of Montana says that the acts which, taken together, amount to a location, begin with the discovery and terminate with the filing for record of the declaratory statement. *Hickey v. Anaconda Co. 81 P. 811.*

These two decisions are not in accord and it may admit of scholastic discussion as to whether the act of visual discovery is part of the location, and

also whether the filing of the record is parcel of the location or only proclamation of the fact of location.

Such points become material chiefly in cases where the doctrine of relation or of conclusive presumptions is invoked. In the Federal case they held that the patent did not prevent attack on the date of discovery and in the latter case that the date of filing for Record was the date of location.

Discarding these technical distinctions the formal acts of appropriation are: (1) Discovery. (2) Location. (3) Record.

Discovery the Inception of Title.

The discovery of a lode of itself gives title to the vein for such length of time as is allowed by law for the completion of the location and record (*Murley v. Ennis, 12 M. R. 360; 2 Colo. 300; Erhardt v. Boaro, 4 M. R. 432; 113 U. S. 527);* and when the location and record are made, if made in due time, the inception of title relates back to the date of discovery.—*Burke v. McDonald, 29 P. 98.* From this fact a later record may show an older and better title than a record made several months earlier.—*Patterson v. Hitchcock, 5 M. R. 542; 3 Colo. 533.* For this reason it is advisable for the location certificate to recite the date of discovery as well as the date of location.

If the statute or district rule does not fix a specific time for the discoverer to follow up his discovery the common law allows him a *reasonable* time to do each act required.

Essentiality of Discovery—How Proved.

Where a location is made without discovery the land remains public domain until there be a discovery. *Tuolumne Co. v. Maier, 66 P. 863.* The fact that they had no valid discoveries may be proved in an action to recover the price of possessory claims sold to plaintiff. *Whitney v. Haskell, 66 Atl. 101.*

The fact of discovery must be proved by the party alleging it as the inception of his possessory right.—*Sands v. Cruikshank, 87 N. W. 589.*

The location notice is not *prima facie* proof of discovery, but where both claimants posted their discovery notice at the same point it is a mutual admission that there was a lode discovered there. *Fox v. Myers, 86 P. 793.*

The Vein Must be Reached.

The discovery is not complete until the vein itself is disclosed. The finding of float or loose quartz is not sufficient. There is a custom generally respected among miners, when any person has discovered indications of a lode and is diligently following up these indications, to allow thirty days in which to uncover the deposit; but if another, by a shorter cut, should first actually reach the vein, it would seem that the first prospector, except as qualified by the *Boaro case* cited below, could assert no priority; and such has been the tenor of the decisions.—*Upton v. Larkin, 6 P. 66; North N. Co. v. Orient Co. 9 M. R. 529; 1 Fed. 522; Overman Co. v. Corcoran, 1 M. R. 691; 15 Nev. 417.* In *Walsh v. Mueller, 40 P. 292*, the facts which constituted the discovery are stated and held such clear proof as warranted the reversal of a finding that there was no discovery.

The fact of discovery of the vein may be inferred. where not proven in specific terms, by the use, by witnesses, of expressions which would be meaningless except upon the assumption that they were speaking of a discovered lode. *Conway v. Hart, 21 M. R. 20; 62 P. 44.*

Prospector's Rights Before Discovery.

If, however, a prospector has discovered float or other indications of the immediate presence of the vein and keeps diligently at work, such inchoate discovery has practically been held by the National Supreme Court in *Erhardt v. Boaro, 15 M. R. 447; 113 U. S. 537*, equivalent to the discovery of the vein in place. If it does not go so far as to decide that the

prospector could at once locate upon such indications, it does decide that he has not only the right to be protected in his possession while following up such indications, but that he will be protected to the extent of a full claim when his location is complete.

Excluding the fact of the intimidation which was in proof in that case, it is difficult to reconcile the opinion with the Colorado Statute, which requires a well defined crevice to be disclosed, and with the language of the R. S. Sec. 2320, which prohibits any location until the discovery of the vein. Whatever the effect of the decision in giving precedence to the prospector upon the floe as against the actual discoverer of the vein itself, it ought at least to be certain that no such disclosure of indications short of uncovering the vein in place, would hold as a discovery sufficient to stake and record upon and leave to the protection of the law, as the miner may do when his discovery, location and record upon the lode in place are once absolute and complete; but when accompanied by his actual presence on the ground with notice posted, the question of prior discovery in fact in such case remains a question for the jury.

A lode claimant before discovery has no right to protection except to the extent of his bare *pedis possessio. Gemmel v. Swain, 72 P. 662.*

The hope and expectation of finding cannot avail to supplant the required disclosure in fact. *Ambergris M. Co. v. Day, 85 P. 115.* But where the lessee of an oil placer claim is sinking a well, his rights will be protected against an attempt to claim the ground by locating him in. *Weed v. Snook, 77 P. 1023.*

The Discoverer in Law is not necessarily the original finder, but any one who, knowing of the existence of the mineral, takes some step toward an appropriation of the land which contains it.—*Nevada Co. v. Home Co. 98 F. 673; Jupiter Co. v. Bodie Co. 4 M. R. 411; 11 F. 666.* It is assumed, of course, in such case that the original actual discoverer failed to perfect his initiatory first right by location. The

vein may be disclosed in a pit sunk on it before by a stranger.—*Hayes v. Lavagnino, 53 P. 1029.*

In *Zerres v. Vanina, 134 F. 614,* it is said: "A relocator is not a discoverer of the mineral, but an appropriator thereof;" which expression though literally true and correctly used as applied to the facts in that case may be misleading if not qualified. A relocator must disclose the lode in his shaft the same as the original locator, and may do so at a point where the original discoverer never supposed it to exist, or by uncovering a new vein within the located ground. Technically therefore the relocator is a discoverer as much as the first finder of the lode, and in his record he gives his "date of discovery" just the same.

A Location on Float Ore, the discovery opening not showing the lode in place, has been expressly held to be invalid. Several tons of such ore had been extracted, but the vein itself from which it came had not been defined.—*Waterloo Co. v. Doe, 56 F. 685.*

On the other hand an Idaho decision allowed a location to stand good made upon "indications of mineral," the report, however, leaving it very indefinite as to what these indications were.—*Burke v. McDonald, 29 P. 98.*

Discovery is a question of fact for the jury. *Columbia Co. v. Duchess Co. 79 P. 385.*

Discovery After Location.

If a location be made before discovery, but is followed by a discovery in the discovery shaft, before any adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid.—*McGinnis v. Egbert, 15 M. R. 329; 8 Colo. 41; Golden Terra Co. v. Mahler, 4 M. R. 390; Jupiter Co. v. Bodie Co. 4 M. R. 411; 11 F. 666; Zollars v. Evans, 4 M. R. 407; 2 McCr. 39; North Noonday Co. v. Orient Co. 9 M. R. 529; 1 F. 522; Erwin v. Perego, 93 F. 608; Nevada Co. v. Home Co. 98 F. 673; Brewster v. Shoemaker, 63 P. 309; Weed v. Snook, 77 P. 1023;*

Sharkey v. Candiani, 85 P. 219, and the Land Department has followed these rulings.—*28 L. D. 526.*

But where a location and record were made with no discovery, a subsequent discovery will not relate back and cut out an intervening location.—*Beals v. Cone, 62 P. 948.*

A discovery after the adverse claim was filed is not available to the plaintiff.—*Healey v. Rupp, 86 P. 1015.*

Discovery and Discovery Shaft Distinguished.

The fact of discovery is a fact of itself, to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location, subsequent to discovery. If a lode, for instance, be discovered in a cross-cut run to operate some other known vein, or if a prospect hole be dug on the outcrop of a lode, and no steps are taken to stake and record such lode, it becomes no more the property of the owner of the cross-cut, or of the party who dug the hole, than if he had never happened to strike it, and although he could have followed up the discovery by perfecting title, his neglect so to do is equivalent to abandonment of the inchoate right given by discovery.—*Willeford v. Bell, 49 P. 6.*

The Discovery Need Not Show Pay Ore.

It is sufficient that it disclose such a crevice as a miner would be willing to further open and follow.—*McShane v. Kenkle, 44 P. 979; Shreve v. Copper Bell Co. 28 P. 315; Muldrick v. Brown, 61 P. 428; Fox v. Myers, 86 P. 793.*

Comparative Size or Value.

If there is once found a lode such as is conceded to be one upon which a prospector may lawfully locate, and he has made such a discovery as justifies a location upon it, it makes no difference what its size or value as compared to the size or value of other veins asserting hostile title against such location.—*Book v. Justice Co. 58 F. 125.*

Proof of Mineral Contents.

The discovery must be of a mineral bearing vein or deposit. The proof of mineral value does not require an assay, although an assay if taken is of material value as evidence.—*Healey v. Rupp, 63 P. 319.*

What is quartz or mineral bearing rock is determinable by the eye in most cases and such ores as galena, zink-blende, copper pyrites and many others necessarily indicate mineral contents. There are, however, varieties of ochre and other discolored earth and rock which may or may not carry any kind of valuable mineral, in which instances an assay or other test in common reason should be required.

Lode Found Outside of Discovery Shaft.

It has been decided in some of the States that although no lode was found in the discovery shaft, its disclosure elsewhere within the claim before any adverse rights had accrued would validate the claim. —*Harrington v. Chambers, 1 P. 362; affirmed 111 U. S. 350; North Noonday Co. v. Orient Co. 9 M. R. 529; 1 F. 522; Tonopah Co. v. Tonopah Co. 125 F. 408.* But to the contrary, in Colorado under its statute is the case of *Van Zandt v. Argentine Co. 4 M. R. 441; 2 McCr. 159; Terrible Co. v. Argentine Co. 89 F. 583; affirmed 122 U. S. 478.* And if it be true that the sinking of the discovery within patented lines or the patenting of the discovery shaft by a hostile claim invalidates the entire claim; and if the discovery shaft be, as it is, the point from which both length and width of the claim are determined, the point at which the notice is to be posted, and where it is required in terms by the language of the statute to show a well defined crevice, and the lode in place —it seems inconsistent to hold that discovery elsewhere would be of any avail when there was none in the discovery shaft.

This question has been decided in terms by the Supreme Court of Colorado; that a lode must be disclosed in the discovery shaft.—*McMillen v. Ferrum*

Co. 74 P. 461; Beals v. Cone, 20 M. R. 591; 62 P. 948.

In a Montana holding, based strictly on the construction of the statute in that State, it was ruled that the discovery shaft need not necessarily show the vein, provided it was disclosed elsewhere on the claim.—*O'Donnell v. Glenn, 19 P. 302.*

By Relocation Upon the Shaft showing the mineral afterwards discovered, this danger can be avoided where no hostile discovery has intervened. But a new record based on a new discovery is an abandonment of the original location.—*Beals v. Cone, supra.*

The Point at Which a Lode is Discovered is not material. It may be discovered at the surface where it outcrops above all surrounding country rock (*Score v. Griffin, 80 P. 331*); or under the slide near the surface at its true apex, by shaft, open cut or boom ditch; or at a greater depth by a tunnel cutting the vein horizontally across its dip, or by a shaft striking it perpendicularly upon the incline.

The Discovery Shaft need not be sunk at the point where the lode was first actually discovered. The prospector has the right to choose a more convenient spot from which to base and outline his claim. —*Harrington v. Chambers, 1 P. 375.*

All Methods of Discovery, whether by shaft, cut, tunnel, boom-ditch or otherwise, are recognized by the statutes or district regulations everywhere, the only distinction being, where a discovery of a certain depth and showing certain things is required, that when discovered at the surface or in the slide there must be a shaft at least ten feet deep, or deeper, if necessary to show a well defined crevice; while if disclosed in a cross-cut or tunnel, the vein must be cut and a well defined crevice exposed, at least ten feet below the surface.

Discovery by Prospecting Drill.

The discovery of a lode or deposit by either horizontal or vertical drilling would doubtless fulfill all the conditions of a legal discovery, and would operate to give the party the legal time allowed to complete a discovery shaft; but the idea that a drill-hole would be considered as the equivalent of a discovery *shaft* can not be entertained. It would be a physical impossibility for such drill-hole to show a well defined crevice, and a drill-hole is neither a shaft, cut or other opening such as are enumerated among those things which may constitute a discovery shaft or cut. The discovery of a lode is a matter of interest to the prospector only; but if he intends to appropriate the same it must be by such physical workings as shall amount to notice to third parties. A drill-hole is not a notorious, physical land mark, and could not be construed as such notice.

Discovery Holds How Long?

A discovery in Colorado, Wyoming, North and South Dakota, Montana and Oregon holds the claim for sixty days allotted to sink the discovery shaft. —*Marshall v. Harney Peak Co. 47 N. W. Rep. 290.* Arizona, New Mexico and Washington allow ninety days. Idaho allows sixty days, but claim must be staked within ten days after discovery. In Alaska the discoverer has ninety days to record, but district rules may prescribe shorter periods for shaft or other location work. Nevada allows ninety days from date of posting location notice, but requires the monuments to be placed within twenty days from date of posting.

In those States which prescribe no specific time, what is denominated a reasonable time is allowed in which to complete the location. What is a reasonable time depends upon circumstances, but it is not to be stretched indefinitely. In *Patterson v. Hitchcock, 5 M. R. 542; 3 Colo. 533,* it was ruled that ninety days to sink a shaft was more than a reasonable time. In

Doe v. Waterloo Co. 55 F. 12, a prospector completed his staking in twenty days, and he was held to be in good time.

As soon as a vein is found by the prospector it is the custom to place at the point of discovery a notice about as follows:

CONTENTION LODE.

The undersigned claims sixty days to sink discovery shaft and three months to record on this vein. January 4, 1908. JOHN S. YOUNG, *Discoverer.*

But if it is *bona fide* the intention of the discoverer to complete his location, the absence of such notice would not be fatal. This is not the notice required when the location is made (*page 36*). It is a mere warning to other prospectors that some one has acquired a prior right to locate on that crevice.—*Erhardt v. Boaro, 15 M. R. 472; 113 U. S. 527.*

A notice with no discovery to justify is of no avail. *Gemmel v. Swain, 72 P. 662; McPherson v. Julius, 95 N. W. 428.* And a notice not followed by staking does not make a location.—*Malecech v. Tinsley, 85 S. W. 81.*

In a New Mexico case this language is used: "The locator is entitled to no appreciable time after discovery to determine whether he desires to locate and claim the benefit of his discovery. Discovery and posting notice of claim, therefore, must be practically cotemporaneous."—*Deeney v. Mineral Co. 67 P. 725.*

If by discovery is meant mere ocular perception of an outcrop visible to all it may be true, but everywhere else, where the discovery is the result of the labor of the prospector he has without doing any further act a reasonable, or the statutory time, to perfect the location.

*Renewing Notice.

It seems useless to add that if the discovery shaft is not completed within the legal time it is

*Cited and approved: *Ingemarson v. Coffey (Colo.), 92 P. 910.*

mere folly to pull down the old notice and put up another of a later date. The sixty days or other statutory period, or the reasonable time, begin to run from the date of discovery, and no self-serving act of the prospector can enlarge the time. It is often attempted to evade this point and secure further time by posting a new notice with some other person named as discoverer.

Location.

The location of a lode consists in defining its position and boundaries, and in doing such acts as indicate and publish the intention to occupy and hold it under the license of the United States.

The formal parts of location include:

1. The location notice at discovery.
2. The discovery shaft.
3. The boundary stakes.

Location Stake.

Although a very old custom, the requirement of the Colorado Act of 1866, repeated in the Act of 1874 as to a location stake, was not always considered imperative, but there are decisions under the present statute which enumerate it as one of the constituent parts of a complete location.—*Strepey v. Stark, 7 Colo. 618; Cheesman v. Shreeve, 40 F. 787; 17 M. R. 260.*

In fact this location notice was in early locations the principal and often the only specific act of location. It was a universal custom before any statutes existed purporting to regulate location.

The words of the act require "a plain sign or notice," but there has never been any uniformity among prospectors in the details of the notice, or in the mode of posting it. It may be substantially complied with by writing on a blazed tree or on a board nailed at discovery, or by legible carving, or by any other rude but honest form of notice, so that it be intelligible and open to observation; but the loose practice of writing on a chip or stick thrown into the discovery hole, is an attempt to evade or abuse

the fair requirement of the law. In *Gird v. California Oil Co. 60 F. 531; 18 M. R. 45*, the notice was placed in a tin can on a mound of stones and it was ruled a proper posting. The following

FORM OF NOTICE ON STAKE.

THE FAMINE LODE, discovered by *Patrick Corcoran, February* 17, 1907. I claim 750 feet easterly and 750 feet westerly from discovery. PATRICK CORCORAN.

fully complies with the law and custom, and would still be sufficient without signing at the foot and without stating the number or direction of feet claimed.

This notice need not call for monuments or ties —that is required of the record only.—*Poujade v. Ryan, 33 P. 660; Brady v. Husby, 33 P. 801.*

Such notice holds the claim for a reasonable time before setting the boundary stakes or other work. —*Union Co. v. Leitch, 64 P. 829.*

A notice giving name of the lode, length, width and direction of claim, dated and signed; held a good compliance with the statute of Wyoming.—*Columbia Co. v. Duchess Co. 79 P. 385.*

A Territorial statute requiring location notice to be posted is supplemental to the Federal Mining Act, and a failure to comply therewith renders the location void; but the mere fact that by mistake the notice was posted on the over-lap of a prior claim does not invalidate the location.—*Upton v. Santa Rita Co. 89 P. 275.*

Right to Swing Claim.

In *Sanders v. Noble, 55 P. 1037*, the Never Sweat discoverers had posted their notice claiming 500 feet Southerly and 1,000 feet Northerly. During the ninety days allowed for filing location certificate other parties discovered the Yukon. They had read the Never Sweat notice and purposely kept clear of its ground. The Court held that the law gave the locators full ninety days to choose where they would ultimately fix their corners; that the Never Sweat locators were not estopped by their notice and could

swing their location nearly at right angles and take in the Yukon ground. The opinion is very thorough and contains a full review of previous cases, but does not meet the proposition: that while the prospector may have such full time for such purposes he loses it the moment he by a positive act limits the general area which his monuments when set will include. We can not for a moment believe that a prospector after posting notice claiming 750 feet easterly and 750 feet westerly, could dispossess an intervening party who had sunk a hole 800 feet easterly from such notice. But such an instance is scarcely distinguishable from the decision quoted. See *Wiltsee v. King Co. 60 P. 896.*

Discovery Shaft Must be on Public Domain.

The discovery must be sunk upon unoccupied public land; that is to say, it must be outside of the lines of any patent or even of any valid location.—*Upton v. Larkin, 6 P. 66; Little Pgh. Co. v. Amie Co. 17 F. 57; Armstrong v. Lower, 6 Colo. 393; 15 M. R. 631; Golden T. Co. v. Mahler, 4 M. R. 390; 4 P. C. L. J. 405; Moyle v. Bullene, 44 P. 69; Watson v. Mayberry, 49 P. 479; Tuolumne Co. v. Maier, 66 P. 863; Reynolds v. Pascoe, Id. 1064; Peoria Co. v. Turner, 79 P. 915.*

In the *Larkin-Upton case*, the discovery shaft was partly on patented ground, but a part of it showing the vein or a portion of the vein was on clear ground and its validity was upheld.—*7 Mont. 449; 144 U. S. 19.*

Plaintiff in an adverse claim suit must show that his location was on vacant public domain.—*McWilliams v. Winslow, 82 P. 538.*

Location Must be Good, When Made.

"A location to be effectual must be good at the time it is made."—*Belk v. Meagher, 104 U. S. 285.* If made on the ground of a prior location, and therefore initiated by trespass, the subsequent abandonment of the prior claim does not make the later location good. Where there were successive reloca-

tions, one made before the abandonment and the other after, the latter is the only valid relocation.—*Brown v. Gurney, 201 U. S. 184*, affirming *G. v. B. 77 P. 357.*

There is one case, *Lavagnino v. Uhlig, 198 U. S. 443*, which can not be reconciled with the above rule, nor can any satisfactory distinction be made between it and the Gurney case: but, as the Gurney case is the later decision, it must be taken as silently overruling the Uhlig holding.

Exceptional Cases—Town Site—Placer.

Assuming that all known lodes have been excepted from a Town Site Patent, a discovery shaft may be sunk upon and within the area of its patent.—*Moyle v. Bullene, 44 P. 69.*

The exclusion of known lodes from placer patents is a like instance and has been ruled the same way.—*Mutchmor v. McCarty, 87 P. 85.*

Patent Over Discovery Shaft.

And where a party allows a claim held by other parties to go to patent over his discovery shaft, "the loss of the discovery is a loss of the location."—*Gwillim v. Donnellan, 115 U. S. 45; 15 M. R. 482; Miller v. Girard, 33 P. 69; Girard v. Carson, 44 P. 508.*

Where a senior claimant allows a location to be made over his discovery shaft and to go to patent, his claim becomes a void location not only as to such patent, but as to all persons and claims.

In an instance with special equities where an agricultural patent was issued covering that end of a lode claim on which all, or nearly all, the work had been done and where the clear end of the claim could be practically reached only by work commenced on the patented end, the court distinguished the case and held that *Gwillim v. Donnellan* did not apply.—*Richard v. Wolfing, 32 P. 971; Post, p. 131.*

Sale of Discovery Shaft.

But the sale of that part of the claim containing the discovery shaft does not invalidate the title of

that part which the locator retains. *Little Pgh. Co. v. Amie Co. 17 F. 57;* and in this case the grantees had afterwards gone to patent on the ground containing the discovery shaft, as parcel of another claim. A distinction can readily be drawn between this and the *Donnellan case, supra;* and yet they are so close that it may be considered dangerous to convey that portion of the lode containing the discovery without proper covenants against patenting it as parcel of another claim.

Claim Must Include Discovery Shaft.

It is self-evident that the claim must include the discovery shaft, and proof that by change of boundaries they were made so as to exclude the discovery shaft is admissible to defeat such location.—*McGinnis v. Egbert, 8 Colo. 54; 15 M. R. 329.*

A location of certain bounds upon a discovery shaft exterior to such bounds, upon a lode which on its strike would extend into the lines staked off, is a claim without a discovery and is void.—*Michael v. Mills, 45 P. 429.*

An underground discovery in another claim aided by finding quartz on surface of the claim in controversy was held sufficient to support the location in *Reiner v. Schroder, 80 P. 517.*

The Shaft Must be Ten Feet Deep, by statute in all the mining States except Alaska, California, North Dakota and Utah. In the excepted States the discovery point may show the lode by a hole or cut sunk or driven to or on the vein; but if the discovery notice is posted on a naked outcrop no hole or cut is necessary unless required by district rule, or by statute as in North Dakota, which requires a shaft, but does not fix the depth.

A State Statute requiring a specific depth of ten feet is a valid exercise of the right of regulation allowed to the legislature under the Congressional Act.—*Sisson v. Sommers, 55 P. 829; Beals v. Cone, 27 Colo. 473; 20 M. R. 616.*

Depth—How Measured.

In those States requiring specific depth, the language of the statute requires the shaft to be at least ten feet from the lowest part of the surrounding surface. In the instance of a shaft started on a steep slope there might be two or three feet of difference btween its two ends or sides. In the instance of a shaft sunk not vertical but following a vein with a heavy pitch it is obvious that a slight difference would exist between a vertical measurement and a measurement following the pitch of the shaft, the latter measurement being the shorter distance and favoring the prospector. And although usually the measurement is taken vertically, yet in such case we do not see but that the measure following the dip would strictly conform to the law, unless, as in Montana, the Statute mentions vertical depth, specifically.

It is obvious that a cut being equivalent to a shaft and the pitch of the vein varying to any degree between true vertical and the horizontal it is impossible to say at what angle the cut would be so flat as to be no longer in strictness a shaft. But a pit dug on a blanket vein reaching down ten feet being a compliance with the law, and no more work being required on a blanket vein than on a fissure, the pit or shaft following the vein by measurement along the vein would be a compliance with the law without regard to its relation to the vertical.

Precautions as to Depth.

After a shaft has been sunk ten feet, the ground at the collar may cave, or the shaft may become so filled with *debris*, or the making of a platform or raised collar may make it difficult to ascertain the exact line of the original rim of the shaft, or to ascertain its original bottom. In view of these facts and of the essential importance of the shaft being full ten feet deep, it is always advisable to sink it two or three feet deeper and remove all ground for cavil or contention.

Subsequent Deepening of Shaft.

Where the discovery shaft has not reached the legal depth at time of record, but has been completed to that depth afterwards and *before any adverse rights have intervened,* such discovery shaft is valid. This is a matter of course on the general ruling as to performance of the various acts of location being sufficient in all instances where complete before third parties assert rights, though not completed within the statutory period.—*McGinnis v. Egbert, 8 Colo. 41; 15 M. R. 329.*

Discovery Shaft Must Show Well Defined Crevice, besides reaching a certain depth.—*Cheesman v. Shreeve, 40 F. 787; 17 M. R. 260.* "Crevice" means a "mineral bearing vein."—*Beals v. Cone, 62 P. 958.*

If a crevice does not show in ten feet, the shaft must go deeper; if it appear sooner, the ten feet must still be completed. The crevice shows the lode discovered, the depth shows the lode appropriated. In the instance of a thin flat deposit a ten-foot shaft might pass entirely through the vein, but it would still show the crevice in its sides and ends.

It Need Not Contain Ore or Mineral, but it must show mineral bearing rock—that is the gangue or crevice material of the vein—*Copper Globe v. Allmann, 64 P. 1020*—and it is error to omit this, as one of the essential elements of a discovery shaft in an instruction purporting to define such elements.—*Bryan v. McCaig, 10 Colo. 309.* It need not show pay ore.—*Muldrick v. Brown, 61 P. 428.*

Discovery Shaft Need Not Show Wall.

It has been decided in Montana (*Foote v. National Co. 2 Mont. 402; 9 M. R. 605*) that at least one wall of the lode must be disclosed before the vein can be considered as discovered. But this decision makes the discovery dependent upon a single incident, which is not by any means the only proof of the existence of a vein. This case, as well as *O'Donnell v. Glenn, 19 P. 302,* was based on a re-

quirement of the Montana Statute to such effect (since repealed), and not upon reason or the nature of the subject-matter, and has therefore no pertinency to discoveries made under the regulations of an entirely different Statute, or in territory where there is no statutory regulation of the subject.—*Fleming v. Daly, 55 P. 947.* There are certain classes of deposits which are doubtless lodes or veins within the intent of the Act of Congress, which show no well defined walls after thorough development, much less within that amount of working which is required as the basis of a record.

Shaft Through Slide or Country.

Nor does it make any difference that the shaft is started in slide or upon a stratum of country rock, if it pierce through the slide or country and find a crevice at a depth of ten feet or more. Such a shaft fulfills all the statutory conditions. But it must reach the lode in place; it is not enough that it strike a mass of ore mixed with broken slide and country. —*Van Zandt v. Argentine Co. 2 McCr. 159; 4 M. R. 441; Waterloo Co. v. Doe, 56 F. 685.*

Discovery in Broken Ground.

It is a common incident to find the lode at surface with its sides and body more or less shattered, or perhaps with the entire top of the vein broken over with the adjacent country. Such a lode is nevertheless in place. The shattering and breaking over are only mechanical accidents and no more destroy the position of the vein as a thing in place than a fault breaks the legal continuity of a vein followed on its strike.—*Jones v. Prospect Co. 31 P. 642.*

Separate Discovery for Each Claim.

The attempt to locate two full claims upon one discovery *shaft* is a palpable fraud.—*16 L. D. 1; McKinstry v. Clark, 4 Mont. 370; Reynolds v. Pascoe, 66 P. 1064.* It is sometimes alleged that two lodes cross in the discovery shaft, but no ten-foot shaft

can prove such fact if such a coincidence ever occurs, nor would it alter the law of the case if it did occur.

Open Cut, Adit and Tunnel Discoveries.

All the mining States which legislate specifically on the subject practically follow the Colorado Statute providing that discovery by means of an open cut, adit, cross-cut or tunnel shall be equivalent to a shaft. Where the discovery is by cross-cut tunnel or open cut, it must show the lode at a depth of ten feet below the surface; that is to say, the breast of the cut or tunnel must be of that depth at its bottom to be the equivalent of a ten-foot discovery shaft; but where discovery is by an adit, the Colorado Supreme Court have ruled in two cases that it need not be ten feet deep, nor any specific depth, at the breast, but that the adit must be ten feet in length along the vein.—*Gray v. Truby, 6 Colo. 278; Electro Co. v. Van Auken, 9 Colo. 204.*

In the latter case they also held that an adit need not enter cover to be an adit. The effect of the latter decision is to confuse all the distinctions between an adit and an open cut, so that if the hole or stripping discloses ten feet in length of the vein, it may be styled an adit, although in fact an open cut. It is not safe to rely on this construction, and no prospector should consider his discovery complete until he has ten feet in depth at the breast of his cut, or a covered adit at least ten feet in along the vein.

The words cross-cut and tunnel are identical terms, except that the former is usually applied to short workings and the latter to those of greater length.

In States which have no such statute the law is the same upon general principles. It can make no difference to the government nor to the rights of other prospectors whether the discovery be by vertical or horizontal cutting. Either mode complies with both the letter and the spirit of the law.

Secret Underground Discovery.

The only class of discoveries which would suggest any difficulty is where, by extending the works of an old claim, the drift or an underground cross-cut or other working, passes beyond the claim and discloses either a new vein, or the extension of the old vein into clear ground. We can not see any objection to locating such claim upon the discovery so made below, the notice being placed on surface at the proper point above the underground discovery and referring to such point of discovery.

In *Little Gunnell Co. v. Kimber, 1 M. R. 536*, a secret underground working from an old claim was not allowed to hold as a valid basis for re-location of an adjoining claim, but that decision was upon the letter of the Colorado Statute concerning re-locations which in terms requires a shaft to be sunk or other new opening to be made, nor had such secret discovery been followed by proper surface notice.

In *Butte Co. v. Barker, 89 P. 302*, defendant had run a cross-cut 102 feet long at 132 feet depth starting from a shaft on a patented claim owned by a third party, the cross-cut extending into new ground which new ground defendant had staked and marked on the surface at a point above the discovery. The location was held void under the Montana Statute, but the reasoning supporting the decision is by no means persuasive. If such cross-cut were run by license of the patentee we cannot see why it would not make a good discovery.

Notice and Staking Upon Cross-Cut Discoveries.

In the case of cross-cuts or tunnels not recorded under the Act of Congress, the point on surface above the discovery intended as the center line of the claim is the point at which the location notice is posted, and the stakes are placed to embrace an area in which this notice stands at a point on such center line. The discovery in the cross-cut will of course be on the same line carried down vertically unless an allowance is made for the dip. With the exception

of the point of placing notice, no distinction exists in the process of locating and recording between these cases and those of surface discoveries.

Where the discoverer staked the claim on the projection of the dip found in his cross-cut (not a statutory tunnel) to surface, the location was held good.—*Brewster v. Shoemaker, 63 P. 309.*

Discovery in Statutory Tunnel.

Where a lode is cut in a tunnel located and recorded so as to claim the rights of a prospecting tunnel under the Act of Congress (Sec. 2323) we advise where practical a posting, staking and recording of each lode as it is cut, exactly as in the case of discovery in an unrecorded cross-cut. But it has been held that such discovery in a located tunnel is good and will hold without any staking on the surface against a subsequent surface discovery.—*Ellet v. Campbell, 18 Colo. 510.* In the case referred to a notice had been posted at the mouth of the tunnel and a record had been made reciting the discovery in the tunnel and claiming the proper length and width, but not giving surface boundaries. This case was affirmed in the Federal Supreme Court, so that the question has now received final judicial construction. The Court, however, concede that it may be true, as suggested in previous Editions of the Mining Rights, that before a patent can be secured to the lode there must be a surface location.—*Campbell v. Ellet, 167 U. S. 116.*

Staking Boundaries.

That the staking of the surface boundaries of the claim has been required upon all surface locations made since May 10, 1872, has been repeatedly decided. —*Gelcich v. Moriarty, 53 Cal. 217; 9 M. R. 498; Hauswirth v. Butcher, 4 Mont. 299; Gohres v. Ill. Co. 67 P. 666; Deeney v. Mineral Co. Id. 724.* These decisions are not made upon local statutes, but as the construction of R. S. Sec. 2324; nor can we see how any other construction can be contended for. It follows, therefore, that since May 10, 1872, surface

staking along the bounds of the claim has been required in all cases, without regard to State, Territorial or District legislation requiring such staking. Such legislation, when it existed, has been to direct the details of the staking, but a sufficient staking has been required under the Act of Congress whether the local rule has been silent or outspoken on this point. The *Martin White* case, below quoted, is to the same effect and gives a full review of the different modes of location on the Pacific Slope.

It may be true in instances, that hardship results under this provision; but it is better for a party to lose a portion of his vein by its departure from its staked lines, than that he be allowed to leave his vein and its course undetermined until a rich discovery in the vicinity suggests the time arrived to "prove up" and take his neighbor's lode. This is not a forced illustration—it is the very evil which the law is intended to prevent.—*Gleason v. Martin White Co. 13 Nev. 442; 9 M. R. 429; Gonu v. Russell, 3 Mont. 358; 12 M. R. 630; Gilpin Co. v. Drake, 8 Colo. 586; Sweet v. Webber, 7 Colo. 443.*

Posting the discovery notice is not the equivalent of marking the surface boundaries.—*Doe v. Waterloo Co. 70 F. 456.*

Overlap on Prior Claims.

The setting of stakes on prior locations or patents has been held valid. Such surveys are sustained with the reservation that such technical trespass is accomplished without breach of the peace.—*Del Monte Co. v. Last Chance Co. 171 U. S. 55; Bunker Hill Co. v. Empire State Co. 109 F. 538; Davis v. Shepherd, 72 P. 57; 30 L. D. 420; 31 Id. 121.*

But the overlap belongs, of course, to the prior claim, and doing the location work upon a prior subsisting claim which has kept up its annual labor initiates no title at all in the new location.—*Anderson v. Caughey, 84 P. 223; Hoban v. Boyer, 85 P. 837.*

Where by mistake the location notice was posted on the overlap it was held that this did not avoid the location.—*Upton v. Santa Rita M. Co. 89 P. 275.*

Fractional Claims.

Where the surrounding ground has been taken up so that only a fraction remains to be located, perhaps three-cornered or otherwise irregular in shape, while a location conforming itself to the lines of the vacant area would be good for the ground covered and for everything enclosed by its vertical planes (*Crown Point Co. v. Buck, 97 F. 462*), it is advisable to take up such vacant area as a parallelogram with parallel end lines so as to secure extralateral rights which would otherwise be lost. The fact that some or all the corners in such case would be on foreign ground would not invalidate.—*McElligott v. Krogh, 90 P. 823.*

The Locator Owns Only What His Lines Enclose. although not chargeable with fault in making them. It is better for him to lose part of the lode than to make title dependent on the result of developments made after lines have been chosen.—*Iron Silver Co. v. Elgin Co. 118 U. S. 196; 15 M. R. 641.*

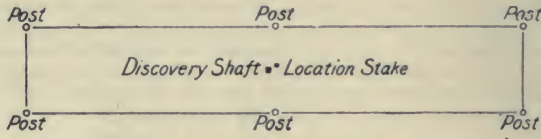
Three Months to Complete Staking is the time allowed by implication from the Colorado Statute. The discoverer has sixty days to complete his discovery shaft and three months to record. If his staking is completed at any time within three months, that is, within the period allowed between the date of discovery and when the record must be made, it is in apt time. He is allowed less time to sink his discovery than to set his stakes, because he may know, as soon as his vein is disclosed, where to sink; but he can not so readily know the course of the vein, and consequently needs time for this part of the location, inasmuch as, his stakes once set, he covers no more of his vein than lies within them.—*Erhardt v. Boaro, 113 U. S. 527; 15 M. R. 472.*

If the setting of his stakes is delayed beyond the period of three months, the location is not invalidated where no adverse rights have intervened. —*McGinnis v. Egbert, 8 Colo. 41; 15 M. R. 329; Crown Point Co. v. Crismon, 65 P. 87.*

When the time to complete staking is not fixed by statute or district rule, a reasonable time is allowed. Twenty days has been held to be a reasonable time.—*Doe v. Waterloo Co. 70 F. 456.*

All Statutes Limiting Time to perfect location and record are directory where there is but a single claimant, or but one set of claimants, and delay becomes material only where the rights of third parties have intervened.—*Healey v. Rupp, 86 P. 1015; Columbia Co. v. Duchess Co. 79 P. 385.*

The Diagram of a Lode Correctly Located, under the present Colorado law (1874-1908), will show substantially as follows:



ELEMENTS OF LOCATION.

1st. Discovery Shaft at least ten feet deep from the lowest part of the rim at the surface, and showing a well-defined crevice.

2d. Location Stake; a plain sign or notice containing the name of the lode, the name of the locator, and the date of discovery.

3d. Center Stakes; two substantial side posts sunk in the ground and hewed or marked on the side which is *in* toward the claim. These side posts must be sunk in the center of each side line; that is, in a 1,500 foot claim, 750 feet from each end line.

4th. Corner Stakes; four substantial posts, one at each corner of the claim, sunk in the ground and hewed or marked on the two sides which are *in* toward the claim.

5th. Extra Angles.

It is the invariable custom where there are angles in the side line, to place a stake, hewed on the side *in* toward the claim, at each angle.

For number, position and marking of stakes in the several States, see STATUTORY REQUIREMENTS, page 60.

Must Cover Apex.

The stakes of the location must include the apex of the vein, and in so far as they fail so to do the claim is void or defective to that extent. That is to say: the theory of the Statute is that a normal location will cover the apex of a vein and have the right to follow the vein on the dip. If the location fail to cover the apex and the lode dips *away* from the claim, so much of the vein is clearly lost; if after losing the apex the location is laid so as to cover the vein on its pitch underneath the side lines as it dips back into or under the side lines, it is still lost to the locator and is held to belong to such outside claim as may cover the apex beyond the point of departure. See page 175.

Locating Without Aid of Surveyor.

In locating any class of claim, a survey is always advisable.

If the prospector, however, can not procure a professional surveyor (and it is often impracticable), a reasonable degree of care will suffice to locate his boundaries with certainty sufficient to make the subsequent record valid.

The record is merely a description of the claim as staked on the ground; if not properly staked the record does not make a good location, but if the location has been properly made, the record can readily be made to describe it fully, whether such location has been made by a surveyor or otherwise.

The discovery shaft being taken as the center of the claim and the initial point of location, a tape

measurement from its center 150* feet at right angles to the lode, reaches to the point where a center stake must be set; return to discovery shaft and continue the same line on the other side the same direction and set the second center or side stake; at right angles to this line and across the center of discovery shaft run a line 750 feet each way along the supposed course of the lode. This gives the center line lengthwise of the claim, and from each end of this center line measure 150 feet on each side for the end lines on the same course as the *line between the center stakes*, which will give the four points at which to set the corner stakes, and will also make the end lines parallel as required by law.

Measuring the length of the claim along its center, with an offset of 150 feet at right angles in each direction at discovery shaft and at each end, brings the same result as if both the side lines as well as the end lines were measured.

Diagram of Lines to be Run.

The dotted lines on the following diagram show the four lines to be measured on a prospector's survey, and the six points at which stakes are to be set:

Staking and Marks on Stakes.

At each of the four real corners of the claim, at the center of each side line and at each extra angle made in the claim, set a substantial stake, blaze it and mark the blazed part with its proper

*Three hundred feet in all States and Territories except Colorado and North Dakota; 150 feet in North Dakota; 75 feet in Clear Creek, Gilpin, Boulder, and Summit Counties, Colorado, and 150 feet in all other counties. This 300, 150 or 75 feet is, of course, one-half the width of a 600, 300 or 150 foot wide claim.

number and the name of the lode. In addition to the number write "North center side stake," "South center side stake," "N. E. Cor.," etc., as the case may be, and put the name of the lode on each stake.

The Statute of Colorado requires each stake to be hewed or marked on the side or sides in toward the claim. This would be satisfied by blazing alone, but it is customary to shave the *in* side (which indicates the relation of the stake to the claim) and mark with pencil the name of the lode, number of corner, etc., as above directed.

Marking three out of four corners was held sufficient in a Utah case.—*Warnock v. DeWitt, 40 P. 205.* Review of citations on the point of sufficient staking.—*Howeth v. Sullenger, 45 P. 841.*

Where not required by Statute it is not essential to put the name of the claim on the boundary stakes. —*Smith v. Newell, 86 F. 56.*

Numbering the Corners.

Any corner may be called No. 1; call the other corner on the same end line No. 2, and proceed thus continuously around the claim, setting an additional corner post at each angle of the claim. Except in official surveys there is no uniform rule as to which corner is numbered one. *L. O. Reg. 138.*

Position of Center Stakes.

In the case of the *Hardin Lode,* the claim was surveyed 600 feet in one direction and 900 feet in the opposite direction from center of discovery. The center stakes were placed opposite discovery, which left them each 150 feet from their proper places. The Supreme Court held that they could not be considered as substantially in the center; but on the other hand, they held that if the corner posts were properly on the ground, the absence of center stakes did not invalidate the location.—*Pollard v. Shively, 5 Colo. 309; 2 M. R. 229.*

Tying the Claim.

In addition to staking the boundaries it is essential to have sufficient ties by which to identify the claim in the location certificate. The use of the bearings to mountain peaks used by surveyors with instruments is impracticable in this kind of survey —take instead of such monuments, marks carved on prominent boulders or prominent blazed trees, neighboring shafts or shaft-houses. Anything which is a "natural object" or "permanent monument" (and reasonably substantial and prominent) is sufficient to identify the claim. From the center of the discovery and from at least one of the corner posts, take careful measurements of the exact distance to such monuments (the most prominent possible under the circumstances) as have been selected to use in the location certificate to tie, describe or identify the claim.

No specific number of ties are required, but at least two different monuments should be selected for such purpose.

What Are Sufficient Ties.

A tree blazed or otherwise referred to by some peculiarity as in *Quimby v. Boyd, 8 Colo. 194*, "a double spruce tree," has been declared a sufficient monument. In certain places trees might be the only objects available, and have been considered good boundary monuments or witnesses from time immemorial. A neighboring shaft or a prominent post firmly fixed in the ground is a good monument.—*Jupiter Co. v. Bodie Co. 11 F. 666; 4 M. R. 412.* Mountain peaks are good calls.—*Craig v. Thompson. 10 Colo. 517.*

A tie to a corner of an unpatented claim is presumptively a good tie.—*Londonderry Co. v. United Co. 88 P. 455.*

In *Vogel v. Warsing, 146 F. 949*, a call for a mountain by name, with course a mile distant, was held a sufficient tie.

Calling for Adjoining or Neighboring Claims.

The earlier decisions were to the effect that a call for another mine or claim was not a call for a permanent monument, and that a location certificate having such a call and no other, or no other sufficiently specific, was not a compliance with R. S. Sec. 2324.—*Baxter Co. v. Patterson, 3 P. 741; Drummond v. Long, 9 Colo. 538; 15 M. R. 510; Gilpin Co. v. Drake, 8 Colo. 586.* As late as 1896 an extreme ruling to the same effect was made in an Idaho case, *Brown v. Levan, 46 P. 661;* overruled in 1902 by *Morrison v. Regan, 67 P. 955.* In the location certificate in the *Levan Case* the first call was "about one-half mile from the Hurt mines, the direction being Southwest." That call of itself was indefinite enough, but the paper also called for three adjoiners. The Statute of Idaho (at that time) required adjoining claims to be named. The Court held that such call for adjoiners did not aid the tie to the Hurt group of mines. If the call for the adjoiners of itself made a good description we can not see why such call should be rejected as not aiding the defective tie to the Hurt mines, from the mere fact that to call for adjoiners was a statutory requirement of the location certificate.

All the later cases hold that a call for even a single claim, either as an adjoiner or near neighbor, makes a sufficient description. That a mine or mining claim may be a permanent monument and that if not so developed or known as to be a permanent monument the proof of such fact is upon the objecting party.—*Book v. Justice Co. 58 F. 106; Riste v. Morton, 49 P. 656; Kinney v. Fleming, 56 P. 723; Seidler v. Lafave, 20 P. 789,* overruling the *Baxter case, supra; Shattuck v. Costello, 68 P. 529.*

A notice calling for adjoiners on all four sides was held valid, although the claim was described as in a quarter section different from the true one.—*Duryea v. Boucher, 7 P. 421.*

Description by Degrees and Minutes Not Essential.

A record based on a location made as above directed, the corners and side stakes being marked and the notice set, which so identifies the situation of the claim (by reference to natural objects or permanent monuments tied to its discovery shaft or corners) that it may be readily found by a stranger examining the record, and for courses calls for some certain general direction and otherwise complies with all the statutory requirements herein stated—is as valid as one which calls for degrees, minutes, metes and bounds.

The Terms Southerly, Northerly, Etc., as used by miners in location certificates and notices, are not to be read as due south or due north so as to defeat the location.—*Smith v. Newell, 86 F. 56; Glass v. Basin Co. 55 P. 1047; Wiltsee v. King Co. 60 P. 896.* And the word "west" may be read "east" when necessary to close upon the starting corner.—*Upton v. Santa Rita Co. 89 P. 275.*

Precautions at Time of Location.

The side and corner stakes being properly set, the location stake fixed and properly inscribed, and the distance to ties or monuments measured, take the precaution at the time to measure the depth of the discovery shaft to see that the full ten feet in depth exist, recollecting that the collar is apt to cave in and the bottom to fill up with soil, inviting an attack on the location for want of legal discovery. Note the exact result of this measurement on the location stake.

Size of Stakes, Etc.

The statute says that the posts shall be *substantial* and shall be *sunk in the ground.* The Land Office regulations, on survey for patent, require them to be not less than four inches in diameter, three feet long, and set eighteen inches in the ground; if of stone, twenty-four inches long.—*Rule 143.*

Trees, Stumps and Boulders as Corner Posts.

In *Pollard v. Shively, 5 Colo. 309; 2 M. R. 229,* the court held that a stump properly marked might be adopted as a boundary stake, and there is no doubt that a stone post literally complies with the law. And the calling for trees as corners, when in fact stakes stood for corners, has been treated as immaterial error, when there were other calls by which to fix the claim.—*Upton v. Larkin, 7 Mont. 449; 15 M. R. 404; Hanson v. Fletcher, 37 P. 480.* The L. O. Regulations also recognize both stones and rock in place.—*Rule 143.*

Cutting a letter into a solid rock held not equivalent to a stake.—*Taylor v. Parenteau, 48 P. 505.*

Where Stakes Can Not be Set.

Where a stake can not be driven on account of bed-rock, it should be fixed in a pile of stones, and in official surveys this marking is required in all cases. Where a stake can not be set on account of precipitous ground, the witness stake should be set as near as possible and on it should be expressed the course and distance to the corner or center stake, for which it is a substitute. The provisions of the Colorado statute on this point (*p. 23*) can not be invoked where the setting of the stakes is merely difficult or inconvenient.—*Crœsus Co. v. Colorado Co. 19 F. 78.* Where the stakes on one end of the claim are not set, merely because the point was difficult of access, it was held that the claim was not valid.—*Id.* A like ruling was made where a corner fell upon a railroad embankment.—*Beals v. Cone, 62 P. 949.* And as a matter of course, the failure to set them through inadvertence or neglect would be fatal.—*Patterson v. Tarbell, 37 P. 76.*

Variation Between Courses and Monuments.

As the result of carelessness, accident or defective instruments, variations between the courses called for in the record and the monuments on the ground, are matters of constant occurrence. The

general rule in such cases is that the monuments control.—*Cullacott v. Cash Co. 8 Colo. 179; 15 M. R. 392; Book v. Justice Co. 58 F. 106; Stonewall Co. v. Peyton, 23 So. 440; Galbraith v. Shasta Co. 76 P. 901; Treadwell v. Marrs, 83 P. 350.*

But it was held in the *Hardin Lode case, 5 Colo. 309; 2 M. R. 229,* that the monuments would not control where they varied from the kind of monuments called for in the record—that a call for a "post" was not satisfied by a "stump"—and further, that in the case of possessory claims the monuments must be kept up.

From this it follows that while a claim remains unpatented if there be in fact a variance between its calls and its ties making it necessary to correct its calls by its ties, that the stakes or other monuments must be maintained on the ground. Otherwise the calls in the location certificate would control. In the same case the Court says that this ruling is essential to prevent the swinging of locations.

Variations Chargeable to Connected Plat.

The U. S. Surveyor General of each state keeps what is called the "Connected Plat," purporting to show every approved survey in relation to each other on its proper section. Where the first survey on any section made an erroneous call for a Government corner, say 1300 feet, when the proper measurement was 1600 feet, it was platted as 1300 feet distant. A second survey correctly measured would show a certain distance from the corner, but, of course, would not tie to the first survey as traced on the connected plat. Instead of recognizing the error as soon as discovered the department persistently for years compelled each successive applicant to treat the first survey as correct and tie to it accordingly.

This resulted in the issue of patents which really overlapped prior surveys, but the field notes appeared clear of any overlap; conversely, an overlap and consequent exclusion would appear where there was in fact no conflict with any prior survey.

It was to remedy this state of affairs that A. C. §2327 was amended in 1904 (p. 512). The effect of the amendment is, however, only to emphasize the common law rule declared in the *Cullacott* case above cited.

Maintaining Stakes.

Once properly set stakes have performed their original office and their subsequent removal or obliteration not done by the act of the party does not vitiate the claim.—*Book v. Justice Co. 58 F. 107; McEvoy v. Hyman, 25 F. 596; 15 M. R. 397; Smith v. Newell, 86 F. 56.*

But where not maintained, a misdescription in the record, otherwise immaterial, may become serious, if not fatal, as above stated, because to correct courses or other errors by monuments, the monuments must, in general, be found upon the ground.

A Location May be Made by an Agent, and in such case written authority is not essential.—*Murley v. Ennis, 2 Colo. 300; 12 M. R. 360; Schultz v. Keeler, 13 P. 481; Rush v. French, 25 P. 816; Dunlap v. Pattison, 42 P. 504; Moore v. Hamerstag, 18 M. R. 256; 109 Cal. 122.* In such case the location certificate should be signed by writing the name of the principal, followed by that of the agent—"*Barton A. Hopkins by J. Mason Hall, agent.*" In writing names on stakes and notices this is unnecessary—write only the name of the principal—because such a signing is not a signature and it is immaterial by whom done so that the act is recognized or adopted by the party whose name is used. Even in subscribing the location certificate the names are often written by the party who makes out the body of the paper (without any mention of agency), and we do not apprehend that this invalidates the document. Such writings are obviously of a class different from deeds, notes, etc., where a name can be legally subscribed as a rule only by the party himself or by one fully authorized so to do by power of attorney or other formal authorization.—*Morton v. Solambo*

Co. 26 Cal. 527; 4 M. R. 463; Gore v. McBrayer, 18 Cal. 583; 1 M. R. 645; Morrison v. Regan, 67 P. 955.

Where a location is made in the name of a supposed principal there must either be a previous authorization to use the name of a principal or a subsequent ratification or adoption of the act. Where the name of an absent person is used without his knowledge there is no legal owner to the claim—no person to stand for its paternity—and the location is not good as against a later valid appropriation. *Thompson v. Spray, 72 Cal. 531.*

A Corporation May Locate.

This has been expressly decided in the cases of *McKinley v. Wheeler, 130 U. S. 630,* and *Thomas v. Chisholm, 13 Colo. 105.* It is required only that it be chartered under the laws of some federal State or Territory. As to the citizenship of its stockholders, see *Doe v. Waterloo Co. 70 F. 463.*

Minors.

The case of *Thompson v. Spray, 72 Cal. 531,* holds that a minor child may make a valid mining location. Where a minor old enough to prospect and work locates a claim we do not see why his minority should invalidate his title, but the use of the names of minor children to obstruct creditors or for other sinister purpose should certainly be unable to resist attack made in proper form. Where a minor takes by descent his title is as unimpeachable as that of his ancestor.

By Government Employe—Deputy Surveyor.

Section 452, R. S., prohibits the location of government land by any officer, clerk or employee of the General Land Office. In *Lavagnino v. Uhlig, 71 P. 1046,* the Supreme Court of Utah held that a lode location by a Deputy Mineral Surveyor was void under said Section. On appeal the Federal Supreme Court did not pass on the point.—*198 U. S. 443.* In the late case of *Hand v. Cook, 92 P. 3,* the Supreme Court of Nevada, by a majority opinion, held that

such Deputy was not a government employee and his location was valid.

Location Prevented by Colluding Co-Tenant.

If the staking and record are in fact not made the claim never becomes perfected, although the reason be that a co-owner violated his duty by colluding with third parties and allowing them to take up the ground. The sole remedy of the injured party is by appropriate action against his co-owner, based on his fraud.—*Lockhart v. Wills, 54 P. 336.*

Irregular Locations.

The contemplation of the law is that a lode claim should be substantially a parallelogram.—*Del Monte case, 171 U. S. 84.* But it seems that with the limitation that the length may not exceed 1,500 feet nor the width 600 feet a location may be made in any convenient shape, the only loss from such form of survey being that no extralateral rights can be claimed for a survey which has not parallel end lines. Surveys in the shape of a horse shoe and in the shape of a triangle respectively were considered in the *Stone Lode case, 118 U. S. 196; 15 M. R. 641,* and in *Montana Co. v. Clark, 42 F. 626; 16 M. R. 80*—and to both, all dip-rights were denied. In the *North Star case, 83 F. 658,* both patents were of no conformable shape, but each of them had issued on a consolidation of claims located before 1872. "There is liberty of surface form under the Act of 1872."—*Walrath v. Champion Co. 171 U. S. 312.*

Locating Across the Strike.

The loss of extralateral rights by such location is considered under APEX. In *Walsh v. Mueller, 40 P. 292,* location had been made, fraudulently, as was alleged in the complaint, across instead of along the strike. We can not see how fraud could be predicated upon such fact standing alone. It simply loses the right to follow on the dip and the surface beyond the proper distance from center of vein is open to hostile location, as explained by diagram on *p. 21.*

Sunday.

In *Union Co. v. Leitch, 64 P. 829*, the first act of location was done on a Sunday and in the subsequent contest no point was made on this fact.

It has been intimated that where the last day of filing falls on a Sunday the locator is within the time if he files on the Monday following.—*Columbia Co. v. Duchess Co. 79 P. 385.*

Neglect of Statutory Details of Location.

Omission to establish center end stake (along with failure to verify the certificate) held fatal under Oregon Statute.—*Wright v. Lyons, 77 P. 81.* The same as to corner stake in Colorado.—*Beals v. Cone, 20 M. R. 592; 62 P. 948. Contra, Warnock v. De-Witt, 11 Utah, 324; 40 P. 205.* Compliance with state law must be proved.—*Copper Globe Co. v. Allman, 21 M. R. 296; 64 P. 1019.*

Parties made a location valid to the extent of the Congressional requirements, but failed to comply with the State Statute then in force. The State Statute was repealed while the locators continued in possession. Held that upon the repeal the location became valid. McFarland, J., dissents.—*Dwinnell v. Dyer, 145 Cal. 12; 78 P. 247.*

A location notice is not required by the U. S. Mining acts, nor at all if not called for by District Rule or Statute.—*Anderson v. Caughey, 84 P. 223.*

TABLE OF STATUTORY REQUIREMENTS.

Indispensable Federal Requirements.

Whether required or not by State Statute or District Rules, the Federal Statute requires that the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and the location certificate must contain (1) the name or names of the locators, (2) the date of the location and (3) such a description of the claim or claims

located by reference to some natural object or permanent monument as will identify the claim.—*R. S. Sec. 2324.*

Taking Colorado as a basis for the manner of locating and recording lode claims, the difference in the regulations of the other States and Territories of the Pacific slope is noted in each paragraph numbered to correspond with the Colorado table below:

Before filing his location certificate the discoverer is required by Statute in

Colorado.

1. To post at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator and the date of the discovery.

2. Within sixty days from the discovery, to sink a discovery shaft ten feet deep, from the lowest part of the rim of shaft, or deeper, if necessary, to show a well defined crevice.

3. To mark the surface boundaries by six posts sunk in the ground, one at each corner and one at the center of each side line hewed or marked on the side or sides in towards the claim.

4. The disclosure of the lode in an open cut, crosscut, or tunnel at the depth of ten feet below the surface, or an adit at least ten feet in along the lode, suffices instead of the ten-foot shaft.

5. Within three months from date of discovery to file a location certificate with the County Recorder giving a proper description of the claim, as required by Federal Statute, and containing also:

a.—the name of the lode;

b.—the name of the locator;

c.—the date of the location;

d.—the number of feet in length on each side of the center of the discovery shaft, and

e.—the general course of the lode.

Alaska.

On June 6, 1900, Congress passed an Act purporting to be a full code of Statute Law for this Territory.—*31 St. L. 321.*

It leaves the status of mining titles the same as in those States which have but few statutory regulations.

It provides for three Recording Divisions and these Divisions are to be subdivided into Recording Districts, for each of which is provided a recorder.

The Clerk of the Court is *ex officio* recorder of all that part of any Recording Division not set off into recording districts.

Until the District Recorders are appointed the miners may appoint a recorder of any organized local mining district.—*Sec. 16.*

There is obvious confusion in these provisions, but it seems evident that the office of the recorder of the recording district is the place where records are ultimately to be filed.

The Act allows ninety days after discovery for the record, and while by its general terms necessarily requiring a discovery and such marking of bounds and description as are everywhere required by the terms of R. S. Sec. 3224, (*pp. 23 and 69*), it does not require a discovery shaft or any other special condition. Sections 15 and 26 of the act are printed under the heading ALASKA.

Arizona.

1. Erect at point of discovery stone monument three feet high, or a post four feet above ground, on which, post notice signed by locator containing:

a.—The name of the claim located.

b.—The name or names of the locators.

c.—The date of the location.

d.—The length and width of the claim in feet, and the distance in feet from the point of discovery to each end of the claim.

e.—The general course of the claim.

f.—The locality of the claim with reference to some natural object or permanent monument whereby the claim can be identified.

2. Within 90 days "from the time of the location" sink discovery shaft 10 feet deep from lowest part of the rim at the surface, or deeper, if necessary, to show mineral in place.

3. Within same time mark boundaries by 6 substantial posts, projecting at least 4 feet above the surface of the ground, or by substantial stone monuments at least 3 feet high, to-wit, one at each corner, and one at the center of each end line.

4. Same as Colorado: amount of work must be equal to a shaft 10 feet deep and 4 feet wide by 6 feet long.

5. Within ninety days from time of location, record with the County Recorder a copy of the location notice posted.

6. The Act of 1901 requiring the certificate to state that the whole or any part of the new location is on abandoned ground was repealed in 1907, and such ground may be taken up by the same acts and formula as if original public domain, with no reference to the fact of abandonment.

California.

No statutory regulations. A Mining Code was enacted in 1897, but repealed in 1899. The manner of staking and other incidents of location are controlled by

district rules, and R. S. Sec. 2324. *See page 23.* These rules usually prescribe time for filing location certificate, and by Secs. 1159 and 1169, Civil Code, 1901, a record with the County Recorder seems to be required.

Idaho.

1. At time of discovery erect monument at place of discovery showing a notice same as Colorado, adding distance claimed along vein each way from monument.

2. Within sixty days "after such location" sink discovery shaft 10 feet deep from lowest part of the rim, and of not less than 16 square feet area.

3. Within 10 days after discovery mark boundaries by monuments at each corner and at each angle in side lines, marked with name of claim and corner or angle it represents. Monuments must be four feet above ground; posts or trees must be 4 inches square or diameter, and hewn and marked on side facing discovery.

4. Any excavation which cuts the vein 10 feet deep and measures 160 cubic feet in extent shall be sufficient.

5. Within 90 days after location file with County Recorder or Deputy Recorder of Mining District a substantial copy of "notice of location" (see No. 6) with affidavit of one of locators attached, that he is a citizen of the United States or declared his intentions; that he is acquainted with the ground claimed and that no part has been located, or if located, that it has been abandoned or forfeited by reason of the failure of the former locators to comply in respect thereto with the requirements of law, and that he has opened new ground to the extent or depth of ten feet as required by the laws of Idaho.

6. At the time of marking boundaries post at the discovery monument a *second* notice containing the name of the locator, name of the claim, date of discovery, the direction and distance claimed along the ledge from the discovery, the distance claimed on each side of the middle of the ledge, the distance and direction from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim and the name of the mining District, County and State. *See page 78.*

The County Recorder within 14 days after receipt of any location certificate is required to send it to the Deputy Recorder of the Mining District, who records and returns it to the County Recorder.

Montana. (Act of 1907.)

1. Post conspicuously at point of discovery a notice containing the name of the claim, name of locator, date of location, which shall be the date of posting, "and the approximate dimensions or area of the claim."

2. Within 30 days after posting, place monument at each corner or angle, to-wit:

a.—A tree at least 8 inches in diameter blazed on four sides.

b.—A post at least 4 inches square by 4½ feet long, set 1 foot in the ground, unless solid rock occur at less depth, surrounded, in all cases, by mound of earth or stone, at least 4 feet in diameter by 2 feet high. A squared stump of same size and so mounded is the equivalent of a post.

c.—A stone at least 6 inches square by 18 inches in length, set 2/3 of its length in the ground, with a mound of earth or stone alongside at least 4 feet in diameter by 2 feet in height, or

d.—A boulder at least 3 feet above the natural surface of the ground on the upper side.

The above classes of monuments (a-d) are enumerated as *prima facie* sufficient, but if others are used it shall be a jury question whether they sufficiently mark the location so that "its boundaries can be readily traced."

Each monument must be marked with name of claim and designation of the corner either by number or cardinal point.

Within 60 days after posting, sink discovery shaft of at least 10 feet vertical depth below lowest part of the rim, or deeper if necessary, to disclose the vein. Cubical contents must be not less than 150 cubic feet.

Any cut or tunnel which discloses the lode at 10 feet vertical depth, with 150 cubic feet of excavation, is equivalent to a discovery shaft.

Where the vein is disclosed at less than 10 feet depth any deficiency in the depth of the discovery may be compensated by equivalent work at other points on the claim. At least 75 cubic feet of excavation must show in the discovery shaft, and the other 75 feet may be done elsewhere.

5. Within 60 days after posting file with County Recorder certificate of location containing: (a) the name of the lode; (b) the name of the locator; (c) date of location and such description with reference to natural object as will identify the claim; (d) the direction and distance claimed along the course of the vein each way from the discovery, and the width on each side of the center of the vein.

6. The location Certificate must be verified by one of the locators, or the authorized agent of the locators, or by any officer or agent of the company, when a corporation is the locator.

VERIFICATION.

State of Montana, }
County of Silver Bow, } ss.

Before me, the subscriber, a Notary Public in and for said county, personally appeared *W. E. Cullen*, to me personally known, who, being duly sworn, saith that he is a citizen of the United States and discoverer and locator

of the *Asia* Lode described in the within certificate of location subscribed by him; that the claim is staked and located on the ground as in said certificate described, and that the location notice was posted at the point of discovery; and that the said certificate and all statements therein made are correct and true.

W. E. CULLEN.

Sworn and subscribed before me this first day of October, A. D., 1907.

.....
Notary Public.

Nevada. (Act of 1907.)

1. TWO LOCATION NOTICES.—The discoverer posts notice "at the time and point of discovery," which notice must contain the name of the lode, the name of the locator, the date of location, the number of feet claimed each way from point of discovery, the width on each side of the center of the vein, and the general course of the vein.

Later, when the monuments are placed, he is required to post the same notice on some one of his monuments.

2. DISCOVERY SHAFT.—There must be a discovery shaft 4 by 6 feet and 10 feet deep from the lowest part of the rim of the shaft at the surface, or deeper if necessary, to show mineral in place.

A crosscut, showing the lode at a depth of 10 feet, or an open cut along the vein containing the same cubical displacement as a shaft 4 by 6 by 10 feet, is equivalent to a discovery shaft.

3. TIME TO SINK AND MONUMENT.—Ninety days are allowed to complete discovery, but the claim must be monumented within 20 days from date of posting.

4. MONUMENTS.—Must be placed at each corner and at center of each side line, and may be trees, posts, stones, stumps, or rock in place.

"All trees, posts or rocks used as monuments, when not 4 feet in diameter at the base, shall be surrounded by a mound of earth or stone 4 feet in diameter by 2 feet in height."

Assuming that the use of a tree or post 4 feet in diameter would be so rare an instance as practically never to occur, the only construction of the statute is that all the monuments should be surrounded by these mounds of earth or stone 4 feet square by 2 feet high. Where a tree is used as a monument it must have a diameter of not less than 4 inches and be cut off not less than 3 feet above the ground and blazed and marked.

Where rock in place is used as a monument it must be capped with loose stone to a height of not less than 3 feet.

Posts must be at least 4 inches in diameter by 4½ feet in length, set 1 foot in the ground.

When a loose stone is used as a monument it must be at least 6 inches in diameter by 18 inches long, set two-thirds of its length in the top of a mound of earth or stone 4 feet in diameter by 2½ feet high.

All monuments "must be so marked as to designate the corners of the claim located."

5. LOCATION CERTIFICATE.—Must be filed within 90 days from date of posting, with County Recorder, and with the District Recorder if there be one. It must contain:

a.—The name of the lode or vein.

b.—The name of the locator.

c.—The date of the location and such description with reference to some natural object or permanent monument as will identify the claim.

d.—The number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the lode or vein as near as may be.

e.—The dimensions and location of the discovery shaft or its equivalent, sunk upon the claim.

f. The location and description of each corner, with the markings thereon.

SPECIAL RECORDS.—The Act provides for the filing, after the monumenting, with the District Recorder, of a preliminary "notice of location," and also for a third filing after survey by a deputy U. S. or licensed State Surveyor, both of which filings are optional and useless except to provide *prima facie* proof of the acts of discovery and location which same function is allowed to the original location certificate.

New Mexico.

1. Post in some conspicuous place on location a notice in writing stating thereon the name of the locator, his intention to locate the claim, and a description of the claim, by reference to natural object or permanent monument.

2. Within 90 days from date of taking possession sink a discovery shaft to a depth of at least 10 feet from the lowest part of the rim, exposing mineral in place.

3. Mark surface boundaries by four substantial posts or monuments one at each corner of the claim so as to distinctly mark the claim on the ground so that its boundaries can be readily traced.

4. Same as Colorado.

5. Within three months after posting notice record a copy thereof in the office of the Recorder of the County.

North Dakota.

1. Same as Colorado, adding length on each side of discovery and width on each side of lode.

2. Within 60 days from uncovering lode sink discovery shaft sufficient depth to show well defined mineral vein or lode.

3. MARKING BOUNDARIES.—"Such surface boundaries shall be marked by 8 substantial posts, hewed or blazed on the side facing the claim, and plainly marked with the name of the lode and the corner, end, or side of the claim that they respectively represent, and sunk in the ground as follows: One at the corner and one at the center of each side line, and one at each end of the lode."

4. Same as Colorado.

5. Within 60 days from date of discovery record in office of Register of Deeds a location certificate containing same as Colorado, adding width claimed on each side of vein.

Oregon.

1. To post notice containing name of lode, name of locator, date of location, number of feet in length claimed each way from discovery, width on each side of lode and "the general course or strike of the vein or lode as nearly as may be, with reference to some natural object or permanent monument in the vicinity thereof."

2. Within 60 days from date of posting to sink discovery shaft at least 10 feet deep from lowest part of rim, or deeper if necessary, to show lode or deposit in place.

3. Within 30 days after posting, mark boundaries by six posts or mounds of stone, or earth and stone, one at each corner and one at center ends of claim; posts 3 feet above ground, 4 inches square or diameter; mounds 2 feet high.

4. Same as Colorado, but open cut must be at least 6 feet deep, 4 feet wide and 10 feet in length along the lode.

5. Within 60 days after date of posting, record with Recorder of conveyances, if there be one, otherwise with Clerk of County, a copy of the notice posted, attaching thereto an affidavit showing that required location work was performed.

NOTE.—By Sec. 3974 Bellinger and Cotton's Code, only one claim by location, may be held upon each lead or vein, by the same person; the discoverer of any new lead or vein, not previously located upon, is allowed one additional claim.

South Dakota.

1. Same as Colorado, adding length on each side of discovery and width on each side of lode.

2. Before filing location certificate sink shaft sufficient to show a well defined mineral vein or lode, and not less than 10 feet in depth on the lower side.

3. MARKING BOUNDARIES.—"Such surface boundaries shall be marked by 8 substantial posts, hewed or blazed on the side or sides facing the claim and plainly marked with the name of the lode and the corner, end, or side of the claim that they respectively represent, and sunk in

the ground, to-wit: One at each corner and one at the center of each side line, and one at each end of the lode."

4. Same as Colorado.

5. Within 60 days from date of discovery, record in office of Register of Deeds, a location certificate containing same as Colorado, adding width claimed on each side of vein.

Utah.

1. At time of making discovery erect a monument and place thereon a notice containing name of lode, name of locator, date of location, length each way from discovery, width on each side of the center of the vein, general course of lode and description with reference to natural object or permanent monument.

2. Regulated by district rules.

3. Claims must be distinctly marked on the ground so that the boundaries can be readily traced. Details of marking left to District Rules.

4. Regulated by District Rules.

5. Within 30 days from date of posting the location notice, file for record in office of County Recorder, if claim be situate without and beyond an original mining district, a substantial copy of the notice of location.

6. Where a mining district exists an original and duplicate copy of the notice of location are filed with the District Recorder, which duplicate the District Recorder sends to the County Recorder to be by him recorded.

NOTE.—The Acts of 1899, page 26, allow districts to be organized, but provide that the nearest boundary line of district shall not be within ten miles of the office of any County Recorder.

Washington.

1. Post at the discovery, at the time of discovery, a notice containing same as Colorado.

2. Within 90 days from date of discovery sink shaft 10 feet deep from the lowest part of the rim. This requirement of shaft does not apply to any mining claim located west of the summit of the Cascade mountains.

3. Within 90 days mark boundaries by substantial posts or stone monuments, bearing name of lode and date of location, at each corner of claim. Posts and monuments not less than 3 feet high; posts not less than 4 inches in diameter. Brush must be cut away and trees must be blazed along lines of claim.

4. Same as Colorado.

5. Within 90 days from date of discovery, record in office of the Auditor of County, a notice containing same as Colorado (except no specific requirement that it contain name of lode).

Wyoming.

1. Same as Colorado, adding name of discoverer.
2. Within 60 days from date of discovery sink a discovery shaft 10 feet deep from the lowest part of the rim.
3. Mark the surface by six substantial monuments of stone or posts, placed and marked same as Colorado.
4. An open cut 10 feet in length, with face 10 feet high, or crosscut or tunnel 10 feet long, cutting the vein 10 feet below the surface, measured from the bottom of such tunnel, is equivalent to a discovery shaft.
5. Within 60 days from date of discovery record with County Clerk a location certificate containing same as Colorado, adding width on each side of center of discovery shaft, and describing claim, if on surveyed land, by such reference to section or quarter section corners, as shall identify the claim beyond question.

RECORD.

Essentials of Location Certificate.

R. S. Sec. 2324.—* * * All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. * * * —*Sec. 5, A. C. May 10, 1872.*

Colorado Statute—Time to File.

R. S. Colo. Sec. 4194.—The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

First—The name of the lode.

Second—The name of the locator.

Third—The date of location.

Fourth—The number of feet in length claimed on each side of the center of discovery shaft.

Fifth—The general course of the lode as near as may be.—*Feb. 13, 1874.*

Indefinite Record Void.

R. S. Colo. Sec. 4195.—Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the general course of the lode, and such description as

shall identify the claim with reasonable certainty, shall be void.—*Id.*

Separate Record of Each Claim.

R. S. Colo. Sec. 4196.—No location certificate shall claim more than one location, whether the location be made by one or several locators. And if it purport to claim more than one location it shall be absolutely void, except as to the first location therein described, and if they are described together, or so that it can not be told which location is first described, the certificate shall be void as to all.—*Id.*

The Statutory Requirements essential to a location certificate stated in section 3150 above printed are followed by similar but not identical statutes in all the mining States and Territories, except California and Alaska. The statutory requirements in the several States, in addition to those above noted, are tabulated, *page 60.*

Where no statutory requirements other than the Federal Statute exist, a certificate following the form below given (*page 75*) would in any State or Territory fully comply with the requirements of the law.

The Nevada Statute requiring the distance each side of the discovery and the general course of the vein to be stated in the location certificate was held merely directory in *Zerres v. Vanina, 134 F. 616.*

So far as such Statutes require a discovery shaft of certain depth or any other item of location or record in itself material, they are only reasonable and have uniformly been held mandatory; but oppressive and trifling details, such as imposed by the 1907 mining act of Nevada, and the 1895 act of Montana (materially amended for the better in 1907) requiring "a description of each corner" and the "dimensions" of the discovery shaft, ought to be held directory only and non-compliance not fatal, as was ruled concerning the requirement that the record give the length each side of the discovery and the general course of the vein, in *Zerres v. Vanina, 134 F. 616.*

The Montana act of 1895 above cited was held mandatory and the attempted compliance fatally defective in *Purdum v. Laddin, 59 P. 153,* and in *Hahn*

v. James, 73 P. 965, but the description in *Walker v. Pennington, 71 P. 156*, was sustained.

Necessity for Record.

It is conceded that the Federal Statute does not in terms require a record to be made.—*Southern Cross Co. v. Europa Co. 15 Nev. 383; Haws v. Victoria Co. 160 U. S. 318.* And although before the mining acts a record in some form was almost universally required, and although either in terms, or assumedly, required in almost every state, yet it seems that the necessity for a record must be created by Statute or District rule.

On these grounds there have been two decisions on the construction of the Nevada law, holding in terms that record was not mandatorily imposed by the mining act of that State. In *Zerres v. Vanina, 134 F. 610*, it was held that failure to record either within the time mentioned in the statute or at any time, did not avoid a discovery made complete by discovery shaft, notice and staking.

In *Ford v. Campbell, 92 P. 206*, the Statute is considered more fully with the holding that a record in Nevada if made at all must be with both District and County Recorder. But that the intent of the Statute was merely to give the locator the benefit of a means of making *prima facie* proof of discovery and location by production of the record and not to defeat the location for want of a record; and that the first location, having a record in only one office, and its description further being fatally defective, was nevertheless a good and permanent location without any record at all.

Close as the question may be this construction is defensible and affords an escape from defeat of priority by failure to comply with the burdensome and almost impossible details required to show in the record, under the act construed by these decisions, and the even more indefensible act in these particulars of 1907, the wording of which on the

point of necessity of record, is the same as that of the old act.

The Time to Record the location certificate is fixed by statute in Colorado within 3 months; North and South Dakota and Wyoming, 60 days; Alaska and Washington, 90 days from date of discovery;

Utah within 30 days after date of posting. Montana and Oregon 60 days from such date. Nevada 90 days from date of posting. New Mexico three months from such date. Arizona and Idaho within ninety days from date of "location."

In California no time is fixed by statute.

For proper office or offices in which to file the location certificate, see Statutory Requirements tabulated on *page 60.*

Where there is no organized mining district, and therefore no district recorder, the certificate should always be filed with the county recorder

Recording Location Notice as Certificate.

It is a custom in California and in many local districts elsewhere to make the location notice in duplicate, placing one on the claim and filing the other for record. The same is the statutory regulation in Idaho, Arizona, Utah, Oregon and New Mexico. The location certificate, or record, everywhere, must contain all that is required of the notice besides giving a full description which is not required of the notice. If, therefore, the custom be to make these instruments duplicates, each must contain what is required of the greater and both would have to contain a full description with reference to monuments, to conform to the Act of Congress. If not exact duplicates it is not fatal.—*Gird v. California Co. 60 F. 531; 18 M. R. 45.*

Description in Location Notice.

Unless expressly required by statute or district rule, and barring the above noted exception as to States, where the record is a duplicate of the posted notice, the location notice is not supposed to call for

any tie or to contain a description of the claim.—*Poujade v. Ryan, 33 P. 660; Souter v. Maguire, 21 P. 183.*

Only the items specifically commanded for it to contain are material and the additional facts so often recited in such notices are harmless surplusage.

Filing for Record is equivalent to record, and subsequent errors or neglect of the officer can not prejudice the locator.—*Weese v. Barker, 7 Colo. 178; Shepard v. Murphy, 58 P. 588.*

The Record Follows the Location, as the location follows the discovery. The record is a publication of the location, and is therefore called the location certificate. Many of the old forms of these certificates are not sufficiently specific and the Surveyor-General in such cases requires a new record to be made before issuing order of survey upon application for patent.

The Certificate as Proof of the Acts of Location.

See EJECTMENT, p. 349.

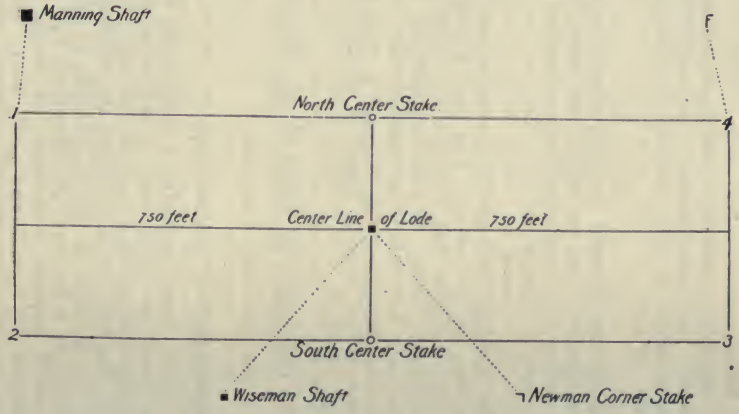
Description of Claim—Ties.

The record contains a description of the claim as staked on the ground. If not properly staked the record does not make a good location; but if the location has been properly made, the certificate can readily be written so as to describe it fully, whether staked by a surveyor or otherwise. The essentials of a valid location certificate are stated concisely in sections 4194, 4195 and 4196, above printed, and a form is given below.

The discovery shaft should always be treated as an essential point of description, and tied to some near and prominent monument, with course and dis-

NORTH

DIAGRAM OF SURVEY



tance therefrom, because it is a much more permanent monument than any stake or corner.

In addition, one or more corners should be tied to other natural objects or permanent monuments, a government corner or discovery shaft of an approved survey being unobjectionable.

The text of the Statute, however, is complied with by the use of only a single tie as the words "natural object or permanent monument" are used in the singular form.

FORM OF LOCATION CERTIFICATE.

KNOW ALL MEN BY THESE PRESENTS, That I, *Edmund H. Lunken*, of the City and County of *Denver*, State of Colorado, claim by right of discovery and location, *fifteen hundred* feet, linear and horizontal measurement, on the CARDINAL LODE, along the vein thereof, with all its dips, variations and angles; together with *one hundred and fifty* feet in width on each side of the middle of said vein at the surface; and all veins, lodes, ledges, deposits and surface ground within the lines of said claim; *seven hundred and fifty* feet on said lode running *north 88 degrees east* from the center of the discovery shaft, and *seven hundred and fifty* feet running *south 88 degrees west* from said center of discovery shaft.

Said claim is situate on the *eastern slope of Bull Hill* in *Cripple Creek* Mining District, County of *Teller*, State of Colorado, and is bounded and described as follows, to wit:

Beginning at corner No. 1 (northwest corner of claim), from which deep shaft of Manning Lode bears N. 2 degrees E. 70 feet and running thence S. 2 degrees E. 300 feet to corner No. 2; thence N. 88 degrees E. 750 feet to south-center stake; thence same course 750 feet to corner No. 3; thence N. 2 degrees W. 300 feet to corner No. 4 (northeast corner), from which blazed pine tree 2 feet in diameter marked "F," bears N. 8 degrees W. 22 feet; thence south 88 degrees W. 750 feet to north-center stake, and thence same course 750 feet to the place of beginning.

From discovery shaft, corner No. 2 of Newman Lode, survey lot No. 787, bears S. 45 degrees E. 280 feet, and discovery shaft of Wiseman Lode bears S. 45 degrees W. 275 feet.

Date of discovery, January 2, 1908. Staked and located February 4, 1908. Date of certificate, February 6, 1908. EDMUND H. LUNKEN.

The above form corresponds in ties and courses to the diagram on *page 74*.

Descriptive Defects in Location Certificate.

In addition to the cases cited on *page 53*, under "LOCATION," there are certain other decisions in particular requiring mention because of their tendency to condone very vague records.

The most material of these cases, because decided by the Court of highest authority, is that of *Hammer v. Garfield Co. 130 U. S. 291; 16 M. R. 125*. There, the opinion, after stating that "a reference to some natural object or permanent monument" is required, says: "Of course the section means when such reference can be made." And it then proceeds to uphold a record whose only call or tie was "about fifteen hundred feet south of Vaughn's Little Jennie Mine." The opinion further treats the claim's own stakes as sufficient monuments. It was with reference to this case that HALLETT J. on objection being made in the Circuit Court to an indefinite record, overruled the objection with the observation "The Supreme Court has repealed the Statute on this point."

In *Gamer v. Glenn, 20 P. 654*, a "large bowlder at the west end of the Tim lode" was the starting point. This was the only monument. Adjoiners were named, but it was proved that no such claim as the "Tim" was known or existed. The record was maintained. The test applied in this case was a fair and reasonable one in its terms, to wit: it must be a description which would enable a person of reasonable intelligence to find the claim and trace its boundaries. Cited and followed on very similar record in *Bramlett v. Flick, 57 P. 871*.

Hanson v. Fletcher, 37 P. 480, decided in terms that the claim's own corners were sufficient monuments within the Act, treating them as a complete description without even referring to the attempted

tie to another mine about a mile distant. An equally vague description was upheld on the same lines in *Credo Co. v. Highland Co. 95 F. 911.* Both these decisions cite and follow the *Garfield case, supra; Farmington Co. v. Rhymney Co. 58 P. 832.*

The statute requires the location to be "marked on the ground" and also a "description by reference." This means and has always been considered to mean a reference to an object or monument distinct from its own stakes or corners, but the above citations go far towards maintaining any record which bounds itself by calling from corner to corner.

In *Darger v. Le Sieur, 30 P. 363,* and *Brown v. Levan, 46 P. 661,* the location certificates were held void for indefiniteness; while in *Bennett v. Harkrader, 158 U. S. 443,* it was held that a location certificate with practically no description at all was good. This last case can not be safely depended on as a precedent to be followed, as the Court proceeded to pass finally on the law by holding that an Act of Congress of 1884, 23 Stat. L. 24, validated all claims in Alaska prior to its date without regard to form, if the claimants were in actual possession.

The record was held fatally defective for failure to state the length and width of the claim and general course of the vein, as required by Oregon statute.—*Sharkey v. Candiani, 85 P. 219.* For failure to call for natural object or monument in *Mutchmor v. McCarty (Cal.), 87 P. 85.* For failure to give dimensions of discovery shaft.—*Helena Co. v. Baggaley (Mont.), 87 P. 455,* and for failure to show that the lode was cut at a depth of ten feet below the surface in *Dolan v. Passmore (Mont.), 85 P. 1034.* For failure to give the length each way from discovery shaft. —*Slothower v. Hunter (Wyo.), 88 P. 36.* Descriptions calling for corner stakes without meandering the bounds were held good in *Bonanza Co. v. Golden Head Co. 29 Utah 159; 80 P. 736.*

A description by the points of the mariner's compass was maintained in *Hayden v. Brown, 53 P. 490.*

Rule of Construction.

Location certificates are of a class to which a liberal, not a technical, rule of construction will be applied and any language which will be fair notice to subsequent prospectors will make a sufficient description.—*Fissure Co. v. Old Susan Co. 63 P. 587; Morrison v. Regan, 67 P. 955; Wells v. Davis, 62 P. 3; McCann v. McMillan, Id. 31.*

But where the State statute requires a description more specific than that implied from the A. C. Sec. 2324, such requirements are mandatory and a record calling only for its own corners is void.—*Purdum v. Laddin, 59 P. 153;* the same as to any such statutory requirements prescribing details of location.—*Copper Globe Co. v. Allman, 64 P. 1020.*

Tying to Location Monument.

In Idaho there must not only be a description by reference to natural objects or permanent monument, but such object must be tied both by course and distance to the monument erected at the point of discovery.—*Clear Water Co. v. San Garde, 61 P. 137.*

Surplusage—Misdescription.

The addition of statements not pertinent or material does not vitiate the paper.—*Preston v. Hunter, 67 F. 996.* And where there is a false course or a false tie, but after discarding the misleading clause enough remains to fully identify the claim, the record is valid. Or a mistake in course or distance may be corrected by a call for a monument or some objective point.—*Smith v. Newell, 86 F. 56.* The fact that the last call fails to close will not vitiate a location certificate otherwise regular.—*Providence Co. v. Burke, 57 P. 641.*

Parol Proof to Connect the Paper With the Thing Described—Ultimate Question of "Location Proved" for the Jury.

Where the description is uncertain by reason of latent defects—that is, where the record has sufficient calls, but the Court can not tell from inspection whether such calls are natural objects or permanent monuments—if the paper makes out a sufficient description, conditioned that they be such objects or monuments, the certificate will be admitted, leaving the jury to decide this as a question of fact. *Upton v. Larkin, 7 Mont. 449; 15 M. R. 404; O'Donnell v. Glenn, 19 P. 302; Russell v. Chumasero, 4 Mont. 309; 15 M. R. 508.* The sufficiency of the location —that is, whether the facts proved show a location complying with the law as the Court gives them the law—is for the decision of the jury.—*Flavin v. Mattingly, 19 P. 384; Fissure Co. v. Old Susan Co. 63 P. 587.*

Whether certain monuments of a certain size would mark the boundaries so that they could be readily traced, is for the jury to say.—*Taylor v. Middleton, 67 Cal. 656; 15 M. R. 284.*

The claimant may by parol, identify the objects called for as permanent monuments.—*Seidler v. Maxfield, 20 P. 794; Metcalf v. Prescott, 10 Mont. 283; 16 M. R. 137.* And a government corner is a good call, although its true position was seriously disputed.—*Gird v. California Co. 60 F. 531; 18 M. R. 45.*

A single tie to a patent corner is sufficient. *Carlin v. Freeman, 75 P. 26.* So is a tie to a single stake. *McIntosh v. Price, 121 F. 716.*

The description of a placer claim by its number as one of a tier of claims was held good in *Smith v. Cascaden, 148 F. 792.*

The Test of Sufficiency.

On the same line as the above case of *Gamer v. Glenn,* and stating the converse of the proposition, the party attacking the certificate may show that a person could not find the premises, taking the loca-

tion certificate for a guide.—*Dillon v. Bayliss, 27 P. 725; Londonderry Co. v. United Co. 88 P. 455.*

The A. C. requires the date of location to be given, but the locator is not estopped to correct a mistake in the date.—*Webb v. Carlson, 83 P. 998.*

Contradicting.

A location certificate regular on its face may be shown by parol to be false in what it calls for.—*Dillon v. Bayliss, 27 P. 725.* Its recited dates may be proved not true.—*Muldoon v. Brown, 59 P. 720.* The same case holds that the misdating must be pleaded. But that is not only to require a party to plead his evidence but to anticipate his adversary's case.

The locator is estopped to deny the validity of his discovery or location as against his grantee.—*Blake v. Thorne, 16 P. 270; McCarthy v. Speed, 80 N. W. 135.*

Overlapping Stakes.

Where a fractional claim was located by stakes all set on or near the lines of the surrounding claims, the staking was upheld.—*West Granite Co. v. Granite Co. 17 P. 547.* And the same where, through locating in the night the stakes overset on the adjoiner.—*Doe v. Tyley, 14 P. 375.*

Immaterial Calls.

The statute does not require the certificate to state the distance from the discovery shaft to the side lines.—*Quimby v. Boyd, 8 Colo. 194.*

Wrong County.

Where the record is made in the right county but a wrong county is called for in the description the error is not fatal.—*Metcalf v. Prescott, 16 M. R. 137.* Like ruling where the record failed to name county or State.—*Talmadge v. St. John, 62 P. 79; Carter v. Bacigalupi, 23 P. 363.*

Verification.

Idaho, Montana and Oregon require the location certificate to be verified, and it has been decided that such requirement is legitimate State legislation under R. S., Sec. 2322.—*Van Buren v. McKinley, 66 P. 956; Wright v. Lyons, 77 P. 81.* The rulings on the Montana Act have been severe, if not extreme. —*McCowan v. McLay, 40 P. 602; Berg v. Koegel, Id. 605; Hickey v. Anaconda Co. 81 P. 806.* But a verification made on information was sustained in *Mares v. Dillon, 75 P. 963.*

Priority of Record is so generally involved with questions of priority of location and of continued possession that this point has in most cases less weight than is generally supposed. Record is the inception of the written title, but the actual title of a mining claim, properly followed up, reaches back to the discovery.

But if a discovery be not followed by a location and record within the time fixed by the statute, an intervening record becomes the prior title. In other words, the rights acquired by discovery are forfeited by neglect to perfect the title by location and record; and that title which if properly followed up would have dated from discovery, will, if it be not so followed up, be suspended in favor of any valid record made after the expiration of a reasonable time, or the period fixed by statute, and before any record of such prior discovery.

Or a record filed before the statutory period has expired, although based on a junior discovery, becomes the senior title the moment the time allowed to the first discovery to complete its record has elapsed without such record being consummated.

The same rule applies to any senior locator who allows the time allowed for sinking his discovery shaft, to expire before he has reached the required depth and found the required crevice.

Possession Without Valid Location or Record.

The cases upon this point require careful examination to ascertain the distinctions made and even after such examination manifest inconsistencies appear.

One series of cases states that where a party is in actual possession no stranger can invade such possession in order to initiate an adverse title; in other words, a prospector can not go upon the claim however invalid or defective, to sink a discovery, set up a notice or plant stakes.—*Phoenix Co. v. Lawrence, 55 Cal. 143; 12 M. R. 261; North Noonday Co. v. Orient Co., 1 F. 522; 9 M. R. 524; Weese v. Barker, 7 Colo. 178; Craig v. Thompson, 10 Colo. 517; Rush v. French, 25 P. 816.*

Certain of these cases hold that he may not invade the actual workings then or lately occupied.—*Faxon v. Barnard, 2 McCr. 44; 9 M. R. 516.* Others hold that he may not enter within the lines of the claim.—*Eilers v. Boatman, 3 Utah, 159; 15 M. R. 462.*

Some of the above citations can be justified, within certain limits, on the principle of preserving the peace on the public domain. But their logical result, if taken without qualification, would be that a party in possession could hold by his possession alone, in disregard of all the requirements of the State Statute and of the Act of Congress.

On the other hand there are many decisions to the effect that a party, after the lapse of the statutory time to complete location and record, can not hold against a claim later in discovery but which has been the first to complete a valid location and record under the Statute—that a miner can hold his claim only by compliance with the regulations prescribed by the owner of the fee (the United States) and the State or district regulations which such owner has authorized.—*McKinstry v. Clark, 4 Mont. 395; Noyes v. Black, Id. 527; Horswell v. Ruiz, 67 Cal. 111; 15 M. R. 488; Garfield Co. v. Hammer, 8 P. 153; Gleeson v. Martin White Co. 13 Nev. 442; 9 M. R. 435; Sweet v. Webber, 7 Colo. 443; Lalande v. McDonald,*

13 P. 349; DuPrat v. James, 65 Cal. 555; 15 M. R. 341.

The Supreme Court of Montana said: "Such location is a condition precedent to the grant. Mere possession not based upon a valid location would not prevent a valid location under the law."—*Belk v. Meagher, 3 Mont. 65; 1 M. R. 534;* and the decision was affirmed by the Federal Supreme Court on the same lines.—*104 U. S. 279; 1 M. R. 510.*

First Complete Location—One Party in Default.

The first in time to comply with all the requirements, after allowing to the one who takes the first step to initiate a title his reasonable or his statutory time to complete the same is the first in law.

If the first discoverer fail to sink his shaft within the statutory period, or to stake or record within the time fixed by law (or within a reasonable time where there is no Statute), and a second party makes a discovery while the first party is in default, such second party has the statutory time to complete his location and record and will hold the ground against the original discoverer, although such original discoverer perfects his location and record before the location on the second discovery is complete.

We think the language of the two preceding paragraphs is justified by the language of the Supreme Court in *Lockhart v. Johnson, 181 U. S. 527,* and many other cases.—*Copper Co. v. Allman, 64 P. 1020; Gregory v. Pershbaker, 73 Cal. 109; 15 M. R. 602; Patterson v. Hitchcock, 3 Colo. 533; 5 M. R. 542; Thallman v. Thomas, 111 F. 277.*

Entry During Discoverer's Locating Time.

The Golden Bell lode was first discovered, put up its notice, sunk its shaft in due time, but did not record until the three months had expired. The Verde had made a discovery during the sixty days allowed to sink the Golden Bell shaft, making such discovery beyond the distance claimed by the Golden Bell notice. After the three months allowed to the Golden Bell had expired, and when the Golden Bell was in

default but the Verde within its time, the Verde made its survey—by such survey taking up ground covered by the Golden Bell notice. The court held that the Verde, though its discovery shaft was sunk on clear ground, was a title initiated by trespass and could not be made the basis of a claim to survey over the Golden Bell territory.—*Omar v. Soper, 11 Colo. 380.*

The Jessie Mac posted its location notice on June 30, 1899, but failed to complete its location. The Cripple Creek posted its location notice within the feet claimed by the Jessie Mac on the 59th day thereafter. Held: that the first posted notice was an appropriation of ground claimed by it, and that no title could become initiate during the 60 days allowed to sink discovery, and that, therefore, the failure of the Jessie Mac to complete its location within the statutory time could not avail to make good the Cripple Creek location.—*Sierra Blanca M. Co. v. Winchell, 83 P. 628. (Colo.)*

With the doctrine that a notice is a complete appropriation of the ground so as to make the entry of a second prospector within its area a trespasser, we can not for one moment agree, (1) because it is carrying the idea of trespass beyond the reason on which it is based; (2) because it operates unjustly against later but more diligent prospectors, and (3) because the weight of authority is against it.

1. The assertion that it is a trespass at all is not true, because there is no possession invaded. *Nash v. McNamara, 93 P. 405.*

2. It is indefensible that a mere notice of intention to locate, which intention the party stating it is not bound to make good, should bar other prospectors from the right to search for mineral on the assumption that the intention will be carried out.

The second prospector takes the chances of the notice being perfected into a complete location, and if it is he must yield to the now perfected prior right; but if the second party completes his location and the first never does, we can see no reason why it should be said that he has a tainted title. If these

last cases cited are law the party who thus failed to perfect his location could wait for years and until the first complete location had been developed into a valuable mine, then make his record and take the ground. For if a location is initiated by trespass it never ripens into a good title short at least of the period of the Statute of Limitations.

3. The exact point is discussed and decided as we claim that it should be in *Helena M. Co. v. Baggaley, 34 Mont., 464; 87 P. 456*, and in the Nash case, *supra.*

In their opinion the Supreme Court of Montana hold: That where a second discoverer enters on the ground within the area covered by a notice lately posted and within its lifetime, but the first discoverer fails to perfect his location in due time and the second does so perfect, the second party holds the ground.

No exact rule can be laid down to meet every variation in which the question could present itself, but after conceding that a man's actual occupation of his workings may not be invaded, and that a drift would amount to such actual occupation of the vein for the length of such drift upon the vein above and below; and that an adverse entry would not be allowed so near to, although not actually upon, the workings of the prior party as to threaten to provoke a breach of the peace—it would seem that after such concessions, the first party having made no record, or no location certificate amounting to a valid record, or having otherwise failed in any essential point necessary to constitute a valid location, the ground would be open to the location and record of a valid claim thereon.—*Lockhart v. Wills, 54 P. 336.*

Record Complete Before Adverse Rights Initiated.

Notwithstanding delay to record or delay to sink discovery or to set stakes or to find a well-defined crevice or to do any other essential act of location, it has been repeatedly and in many forms held that if at length the record or location be in fact perfected before the hostile title had its inception, that the

title to such delayed but finally completed location is perfect as against any later initiated title, and that the last act of location relates back to and the title begins from the original date of discovery.—*McGinnis v. Egbert, 8 Colo. 41; 15 M. R. 329; Preston v. Hunter, 67 F. 996.*

All Parties in Default.

In the suit between the Green Mountain and the Ontario it appeared that the Green Mountain was discovered in August, 1877, and recorded in March, 1878. The Ontario was discovered in February and recorded in July, 1878. Each had exceeded the three months allowed by law to record and the priority in title (as to this point) was given to the first discovery. It seems that it would have been otherwise if the Ontario, although a later discovery, had completed its record within the three months.—*Faxon v. Barnard, 2 McCr. 44; 9 M. R. 515.*

The Green Mountain had both first discovery and first record, but with a long interval between. During its delay a second discovery had intervened, but it also over-stepped the statutory time and so allowed the Green Mountain to secure the first record. This case has been lately approved in *Lockhart v. Johnson, 181 U. S. 527.* We have always contended that where all parties are in default in completing their location and record within the statutory periods that the first record based upon a valid discovery and location becomes a perfected title and takes the ground without regard to priority of discovery.—*Copper Co. v. Allman, 64 P. 1020.*

Possession During Locating Period.

The possession of the prospector during the period allowed by law to complete his location and record is protected, although he has so far no paper title.—*Erhardt v. Boaro, 113 U. S. 527; 15 M. R. 472; Marshall v. Harney Peak Co. 47 N. W. 290.* His location certificate when recorded relates back to the date of his discovery.

And no party can intrude within his lines marked out or within the ground which he has a right to

cover during that period—limited to 750 feet on each end of his discovery, unless his location notice (*page 36*) fixes the number of feet claimed each way.—*Bramlett v. Flick, 57 P. 869.*

Possession After Such Period Elapsed.

Possession, at all times, without regard to record, location or even the fee simple, still gives a certain title as against a mere trespasser, upon which ejectment and other actions may be maintained.—*Campbell v. Rankin, 99 U. S. 261; 12 M. R. 257; Hawxhurst v. Lander, 28 Cal. 231; 12 M. R. 214; Haws v. Victoria Co. 160 U. S. 303.* Long continued possession presumes ownership.—*Risch v. Wiseman, 59 P. 1111.* But as we have already intimated, such right by possession yields place at once to right by title, when such title is offered and proved.—*Wilson v. Triumph Co. 56 P. 301.* It requires location to give the right of possession.—*Jordan v. Duke, 36 P. 896.* See "EJECTMENT."

Possession is a title only by sufferance in default of something better—it is the starting point, not the goal of title—and will not prevail against the fee simple; *Courchaine v. Bullion Co. 4 Nev. 369; 12 M. R. 235;* or against a title perfected under the district rules; *English v. Johnson, 17 Cal. 107; 12 M. R. 202;* or against a complete location and record made in compliance with the law.—*Sears v. Taylor, 4 Colo. 38; 5 M. R. 318.* Where neither party perfects a valid location the first in possession has the better right. —*Neuebaumer v. Woodman, 26 P. 900.*

Where a placer locator has no discovery he has no actual *bona fide* possession and the ground is open to peaceable entry by others.—*Miller v. Chrisman, 73 P. 1083.*

Trespass—Force—Fraud.

No right can be initiated on government land by force, fraud or clandestine entry upon the actual possession of another, whether the location of such other be valid or invalid.—*Nevada Co. v. Home Co. 98 F. 674.* Title to a mining claim can not be initiated by an entry upon a prior valid existing location.—*Kirk*

v. Meldrum, 65 P. 634. But the possession of the first occupant, where he has no valid location, does not prevent an entry by a later party intending to make a location.—*Thallmann v. Thomas, 111 F. 277; Walsh v. Henry, 28 P. 449.*

A pretended relocation by marking the stakes of the first locator and adopting his lines in the certificate, the first locator being in no default, is void.—*Moffatt v. Blue River Co. 80 P. 139.*

Defective Record Aided by Possession.

In *Eaton v. Norris, 63 P. 856*, the Court considered both the fact of continued possession and the fact that the intruders had admitted knowledge of the prior claim—as matters of evidence to aid the older title. These dicta were wholly unnecessary to the decision, as the prior locators had substantial proof of location without these incidents. In *Talmadge v. St. John, 62 P. 79*, a description calling only for its own corners was held valid by the aid of such possession. But in *Brown v. Oregon Co. 110 F. 728*, it is held in terms that if the prior location is not valid the later comer may locate though with full notice of the prior asserted claim.

In general terms, the first who complies with the law in completing his location is the first in right and this complaisant recognition of priority on the ground, and of void notices, as tending to raise a supposed equity, is simply judicial weakness, leading only to uncertainty and injustice. The Oregon Co. case boldly states the law as it should be stated. As between two prospectors, the fact that one is the first comer or the fact that the second knew that the first was on the ground before him, does not weaken the rights of the second comer if he be the first to comply with the law—the common protector of the rights of both.

The extent of the indulgence legally to be allowed to the prior locator is to view his evidence "in the most favorable light such evidence will reasonably justify."—*Ambergris M. Co. v. Day, 85 P. 110.*

Extensions.

The paragraph from section 2320, quoted on page 23, of itself disposes of all "extensions" and side claims, unless they be of themselves, howsoever named, independent discoveries and locations. "Extension" is a word often added to the name proper of a location staked off to the right or left of some developed vein, suggestive of the hope, if not the fact, that the new location is planted on the same ore body on its strike.

Lode Location Held Good as Placer.

Where a party had located a claim, not describing it as a lode, but of the length and width of a lode claim upon a deposit usually classed as placer, the Court held that placers and lodes are taken up by substantially the same procedure and that if what was done made it a valid mining location it would be sustained as a placer.—*McCann v. McMillan, 62 P. 31.* But a placer location on a metallic vein was held void in *Buffalo Co. v. Crump, 70 Ark. 525; 22 M. R. 276.*

ABANDONMENT.

District and Territorial Regulations.

The district regulations in early years often declared what acts or omissions should amount to an abandonment. Failure to represent or work for a single season or even for a very limited period was usually sufficient cause. As a camp became more or less deserted the miners about to leave frequently met and passed resolutions to the other extreme—that all claims should remain valid without any work or representation.

Where the district organizations are still preserved a rule covering or attempting to cover this point may remain valid and enforceable except that a rule requiring less than $100 annual labor would be an infringement upon the Congressional Act.—

Original Co. v. Winthrop Co. 60 Cal. 631; Northmore v. Simmons, 97 F. 386.

The legislatures have not attempted the dangerous matter of defining in terms what amounts to abandonment. The circumstances surrounding each particular case vary too much to make a sweeping rule in all instances fair.

Confined to Possessory Titles—Associated With Annual Labor.

Although the title to mining claims has been at all times of that class which might be lost by abandonment *(Ferris v. Coover, 10 Cal. 631)*, and although a technical abandonment may at this day be proved as to any sort of possessory title, the subject has lost much of its importance except in connection with the annual labor acts.

Abandonment Is a Question of Fact, and the fact is to be found from the intention.—*Myers v. Spooner, 55 Cal. 257; 9 M. R. 519; Taylor v. Middleton, 67 Cal. 656; 15 M. R. 284; Mallett v. Uncle Sam Co. 1 Nev. 188; 1 M. R. 17; Oreamuno v. Uncle Sam Co. 1 Nev. 215; 1 M. R. 32; Marshall v. Harney Peak Co. 47 N. W. 290.* It is a question of fact for the jury.—*Aye v. Philadelphia Co. 44 Atl. 555.* Desertion and abandonment are equivalent terms.—*Derry v. Ross, 5 Colo. 295; 1 M. R. 1.*

Abandonment being thus a matter of intention, it follows that even after doing his work if the miner should deliberately quit his claim with expression of his intention to never return to it, or give permission to others to occupy it as their own, such manifest proof of intent would establish abandonment; but in most cases the failure to do the annual labor is the fact upon which the issue is predicated and the law of annual labor involves no question of intent.—*Depuy v. Williams, 5 M. R. 251; Doherty v. Morris, 11 Colo. 12.*

Ceasing to work because ore not salable is no abandonment.—*Hosford v. Metcalf, 84 N. W. 1054.*

In *McCann v. McMillan, 21 M. R. 6*, the owner of a claim, on the last day but one for doing his annual labor proclaimed the claim abandoned and at once went through the form of relocating it in the name of a third party. On the first day of January it was relocated by the plaintiffs. The Court held that the pretended relocation of December 30 was void because there was in fact no abandonment. The decision was clearly right because the whole affair was a collusive proceeding: the defendant did not intend to abandon but to hold in the name of a friend. But if a third party not in collusion with the first owner had located on December 31 it could have been readily held that the abandonment was complete although the friendly relocation attempted in connection with it was void.

A father failed to do the work in 1890. His son re-located in 1891 and afterwards conveyed to the father. The location of 1891 was defective. In a suit by the owner of a later location, Held: that defendant, the father, could not recall his abandonment and rely on his original title.—*Niles v. Kennan, 64 P. 669.*

Abandonment and Forfeiture Distinguished.

These two terms are often used indiscriminately, but there is a clear distinction between them. Abandonment is the act and forfeiture is the consequence. It requires only one party to abandon; it requires at least two parties to work a forfeiture. If the owner of a claim quits work and leaves the country, intending never to return, leaving no agent to represent his property, it would be a typical case of abandonment. But if at a later period he returns and resumes work his title would not have been lost—he would not be required to relocate—if no second party had in the meantime attempted to locate the claim. There has been in such case an abandonment but no forfeiture, and no second party having acquired rights, the intent to abandon has been a mere matter of sentiment.

On the other hand the intention to abandon becomes immaterial in two classes of cases where it may be said there has been no abandonment, but there is a forfeiture.

1. Where a lessee is under covenant, or an owner is under a legal duty to do a certain thing; if he neglects to do it his rights are forfeited without regard to his intention as soon as the lessor elects to declare the forfeiture, or in the case of an unpatented mining claim when a second party makes his relocation. *Parish Fork Co. v. Bridgewater Co. 51 W. Va. 583; 22 M. R. 145; McKay v. McDougal, 64 P. 669.*

2. Where the conduct of the party is such that abandonment is a necessary conclusion notwithstanding the want, or a party's denial, of his intention. *Trevaskis v. Peard, 18 M. R. 353; 44 Pac. 246; N. A. Expl. Co. v. Adams, 104 F. 404.*

Quitting to Lure.

Such a thing as a conditional abandonment can not be recognized. Where the owner allows strangers to hold a claim under color of title, standing by and intending to resume work only in case its development shows pay, his action amounts to abandonment.—*Trevaskis v. Peard, 44 P. 246.*

How Proved.

Lapse of time, though not conclusive, is an incident tending to prove abandonment.—*Mallett v. Uncle Sam Co. 1 Nev. 188; 1 M. R. 17; Beaver Co. v. St. Vrain Co. 6 Colo. App. 130.* Leaving tools in the mine tends to disprove it.—*Harkness v. Burton, 39 Ia. 101; 9 M. R. 318.* Proof that a stranger had relocated ground as abandoned does not prove that it was in such condition.—*McGinnis v. Egbert, 8 Colo. 41; 15 M. R. 329.*

Where the owners of a three-fourths interest in a claim permitted J. to enter and relocate it as a new claim, this was an abandonment as to such three-fourths interest, but did not bind the owner of the remaining fourth. But such owner subsequently

assenting the abandonment became complete and the new location was not to be considered as a claim initiated by trespass.—*Conn v. Oberto, 76 P. 369; Oberto v. Smith, 86 P. 86.*

Of Prospect Before Record.

Where a discoverer by conduct shows an intent to quit and not perfect his location begun, the claim is abandoned and strangers need not await the expiration of the prospector's time before locating.—*Kinney v. Fleming, 56 P. 723.*

Ditches and Water.

Failure to use water and allowing ditch to go to decay are evidence tending to prove abandonment.—*Dorr v. Hammond, 7 Colo. 79; Sieber v. Frink, 7 Colo. 149.* But non-user alone does not of itself necessarily imply abandonment.—*Welch v. Garrett, 51 P. 405; Integral Co. v. Altoona Co. 75 F. 379; N. A. Co. v. Adams, 104 F. 404.* A ditch may be abandoned without the abandonment of the owner's water rights.—*Nichols v. McIntosh, 19 Colo. 22; Wood v. Etiwanda Co. 81 P. 512.*

Other Subjects of Abandonment.

A leasehold interest, water, slag and tailings, are things which may be lost by abandonment.—*Glasgow v. Chartiers Co. 25 Atl. 232; Barker v. Dale, 3 Pgh. 190; 8 M. R. 597; Dougherty v. Creary, 30 Cal. 290; 1 M. R. 35; McGoon v. Ankeny, 11 Ill. 558; 1 M. R. 9; Porter v. Noyes, 10 N. W. 77.* A prospecting contract may be abandoned.—*Chadbourne v. Davis, 9 Colo. 581; 15 M. R. 620; McLaughlin v. Thompson, 2 Colo. App. 135.* And failure to supply his outfit to the prospector will justify abandonment.—*Murley v. Ennis, 2 Colo. 300; 12 M. R. 360.*

All improvements found on abandoned claims belong to the relocator.—*Wolfskill v. Smith, 89 P. 1001.*

Pleading.

There has been no consistency in the rulings as to whether abandonment necessitates a special plea. California has uniformly held that it does not.—*Willson v. Cleaveland, 30 Cal. 192; Bell v. Bed Rock Co. 1 M. R. 45; 36 Cal. 214. Contreras v. Merck, 63 P. 336. Trevaskis v. Peard, supra.* But the current of authority elsewhere seems to require such plea.—*Hector Co. v. Valley View Co. 64 P. 205. Bishop v. Baisley, 41 P. 936. Renshaw v. Switzer, 13 P. 127.*

Whether pleaded or not the decisions are uniform that when relied on the party asserting it has the burden of proof.—*Johnson v. Young, 18 Colo. 625; Nichols v. McIntosh, 19 Colo. 22; Hammer v. Garfield Co. 130 U. S. 291.* And it must be strictly proved.—*Mt. Diablo Co. v. Callison, 5 Saw. 439; Colman v. Clements, 5 M. R. 247; 23 Cal. 245.*

As to pleading and proof in Adverse Claim cases see p. 487.

Outstanding Abandoned Title.

The fact that there may have been locations now abandoned and not claimed by either party renders such outstanding titles of no relevancy to the rights of either.—*Craig v. Thompson, 10 Colo. 517.*

ANNUAL LABOR.

Annual Expenditure.

R. S. Sec. 2324. * * * —On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the **first day of Janu-*

*In the Revised Statutes the date printed is June 10, 1874, the compilers having overlooked the second Act extending the time, approved June 6, 1874.—*18 Stat. L., part 3, page 61.*

ary, eighten hundred and seventy-five, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. * * * —*Sec. 5, A. C. May 10, 1872.*

Amendment of 1880, Adopting the Calendar Year.

Sec. 2.—That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided,* That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."—*Jan. 22, 1880.*

Annual Labor Was Not Required by either Legislative or Congressional law until after passage of the A. C. May 10, 1872.

Often Required by District Rules.

By some of these rules a man was bound to do some work upon his claim every week, or every month, but these rules in most sections had fallen into disuse at the time of the passage of the Act referred to. Their provisions both as to amount required and the period in which to perform are largely if not entirely superseded by the terms of the Congressional Act.

The idea of annual or periodical labor is not new; it was a part of the Spanish system, and generally prevailed on the Pacific slope.

The A. C. May 10, 1872, divided lodes into two classes with respect to labor:

1. Lodes located before its passage.
2. Lodes located after its passage.

Claims Located Before May 10, 1872.

The amount of labor required on all lodes was $10 for each hundred feet, but where claims were

held in common, the whole amount of work might be done on one claim. The time for the first work on old lodes was originally fixed to expire May 10, 1873, *i. e.*, one year after the passage of the act. It was further extended to June 10, 1874, and finally postponed to January 1, 1875.—*Thompson v. Jacobs 2 P. 714.*

The Act of 1880 made no change either in the amount or time of annual labor on old claims. It has always been and still is, $10 for each 100 feet during each year of our Lord, beginning January 1, 1875; and the time between May 10, 1872, and January 1, 1875, constituted the period for the first required labor.

Where the lode consists of undivided claims of 100 or 200 feet each, as in the case of most locations made before May 10, 1872, any one or more claims may be saved by the expenditure of $10 worth of labor to each 100 feet which the owner desires to segregate and hold, leaving the remainder to forfeiture; or when the series of claims are held in common, the full amount may be expended on any one claim, whether they were originally recorded as joint or as several locations; but in all cases where less than the amount required to hold the entire lode is expended, the owner, in his proof of labor, should state the work as done for the purpose of holding only so many feet, designating where they lie upon the lode.

But few claims remain subject to this law. During the lapse of time, now more than thirty years, they have been either abandoned or passed on to patent, or have been re-located under the Act of 1872. When so relocated they would be governed by the terms of the next subdivision.

Claims Located Since May 10, 1872.

The various extensions of time for work on old lodes did not apply to the new lodes. The period for the first work was nexer extended, nor has any change been made except the Act of 1880. Under the original Act the annual period for labor on claims located after its date, May 10, 1872, began on

the *date of location*,.and this date was hard to fix with exactness. It might have been the date of discovery, or any date, intermediate between discovery and record. The Act of 1880 makes the annual period now coincide with that fixed for old claims, to wit: each calendar year.

Each Claim an Entirety—Work on Subdivided Claim.

The 1,500-foot lodes being single claims of that length and a certain amount of work being required upon the *claim* and the clause as to "each 100 feet in length along the vein" not applying to these new locations, it does not seem that a party, by expending any portion of the full amount, can save any fractional portion of his lode. But if a party own a segregated portion of such claim: Is he required to do the full amount essential to hold a claim, in case the other owners refuse to contribute?

It seems he is under this necessity, and each interested party must see for himself that the amount required to hold the claim is done by some person, and if the whole burden falls upon one party, the rest of the claim becomes forfeit to such party. There is no distinction made between those who own separate feet and those who own undivided interests in the claim.

The word "co-owners," used in the Act, does not appear to be used in its ordinary acceptation, as tenants in common, but to include all the owners, either in common or after they have segregated their interests; the claim seems to be treated as an individual item so far as the relations between the Government and the miner are concerned; if, therefore, all the labor is performed by the owner of the east end, he may claim forfeit of the west end; or if it is all performed by the owner of an undivided half, he is in position to become the sole owner by proper notice under the forfeiture clause upon refusal of the other co-tenant to contribute his proportion. But

this is only the *apparent reading* of the Act as to claims which have been segregated into several parts, and would give a benefit to a party who had no more connection with the other end of the claim than a mere stranger. Consequently this can only be treated as a suggestion of the true construction of an Act which is so worded as to be entirely ambiguous on this point.

The above paragraph is from the Fifth edition of this book in 1881, but we have seen no decision nor found any reason to since change it as the true construction of the Act.

$500 Work Already Done.

The fact that sufficient improvement ($500 worth) has been done to authorize issuance of patent, does not dispense with the necessity for the annual expenditure.

Annual labor is required, although the claimant has been in possession for more than the statutory period.—*Upton v. Santa Rita Co. 89 P. 275.*

Pending Application for Patent, until entry, the work must be kept up.—*South End Co. v. Tinney, 35 P. 89.* Where an applicant after publication delays entry and neglects his annual labor the ground is open for relocation.—*Gillis v. Downey, 85 F. 483.* But see on this point, page 467.

Annual Labor After Entry.

It has been decided that annual labor can not be required after entry in the Land Office, although the patent has not yet been formally issued; and such decision is clearly correct, because the patent, when it issues, relates back to the date of entry, and so satisfies the wording of the Act, which requires the annual labor each year "until patented."—*Alta Co. v. Benson Co. 16 P. 565; 145 U. S. 428; Aurora Hill Co. v. 85 Co. 34 F. 515; 15 M. R. 581; L. O. Reg. 14; 26 L. D. 196; 27 Id. 396.* A relocation can not be made on entered lands as long as the entry stands.—*Neilson v. Champaigne Co. 111 F. 655; Benson Co.*

v. Alta Co. 145 U. S. 428; Southern Cross Co. v. Sexton, 82 P. 423. Nevertheless, in such case, a party runs the risk of the consequences in case his receiver's receipt should be canceled.—*Swiggart v. Walker, 30 P. 162.* In *Murray v. Polglase, 59 P. 440,* the Receiver's receipt had been set aside for fraud, the annual labor not kept up and there had been a relocation. Held that the claim was lost to the entryman.

Time During Which Labor Must Be Completed.

On all lodes located before or since May 10, 1872, the year for doing the labor is each *year of our Lord,* beginning January 1st, and ending December 31st.

The Location Year.

Since the Act of 1880 no annual labor is required during the year in which the location is made. —*Hall v. Hale, 8 Colo. 351; McGinnis v. Egbert, 15 M. R. 329; 8 Colo. 41.* Its language is that the period "shall commence on the first day of January succeeding the date of location."

If a discovery be made in the latter part of the year but the staking and record are not completed until some time in the early part of the following year the latter year would be, in our opinion, the location year, and there could be no forfeiture for neglect to do the annual labor during that year; but we find no case where the point has been in terms decided. A location is not complete until all its several parts have been perfected.—*McKay v. McDougall, 64 P. 669; Hickey v. Anaconda Co. 81 P. 811.*

But a district rule or Statute may impose conditions which imply expenditure during the location year.—*Northmore v. Simmons, 97 F. 387.*

Each Annual Period An Entirety.

The owner has the whole of each year to do his $100 worth of work or make his $100 worth of improvements.—*Belk v. Meagher, 3 Mont. 65; 1 M. R. 522; Atkins v. Hendree, 1 Ida. 107; 2 M. R. 328; Mills v. Fletcher, 34 P. 637.*

It therefore follows that if, for instance, he has expended $100 during the first month of the first year he may wait until the twelfth month of the second year before he does his second year's work. That such is the law admits of no doubt upon the reading of the Act. At the same time the disposition to take advantage of this fact leads to delays which often ultimate in allowing the whole time to pass by and the claim to become liable to relocation.

What Counts for Improvements.

Any work done for the purpose of discovering minerals is improvements within the spirit of the statute.—*U. S. v. Iron-Silver Co. 24 F. 568.* Road building counted as annual labor.—*Doherty v. Morris, 28 P. 85; Mt. Diablo Co. v. Callison, 5 Sawy. 439; 9 M. R. 616.* Flumes, drains or the turning of a stream or the sinking of a common shaft will count. —*St. Louis Co. v. Kemp, 104 U. S. 636; 11 M. R. 692.*

Work done by any party in privity of title with the owner *(Godfrey v. Faust, 101 N. W. 718; 105 N. W. 460)*, and even work gratuitously contributed, will count.—*Anderson v. Caughey, 84 P. 223.*

Watchman.

Where a mine is idle, the time and labor of a watchman or custodian may be treated as annual labor.—*Lockhart v. Rollins, 21 P. 413; 16 M. R. 16; Altoona Co. v. Integral Co. 45 P. 1047; Tripp v. Dunphy, 28 L. D. 14.* Pay of watchman allowed where there is portable property needing protection.—*Kinsley v. New Vulture Co. 90 P. 438.* Otherwise where there is no such property.—*Gear v. Ford, 88 P. 600.*

What Will Not Count.

A house for the use of the miners built 200 feet away from the claim can not be considered as annual labor.—*Remmington v. Bandit, 9 Pac. 819.*

The expense of taking timbers, lumber, bucket, rope and tools to the mine—all carried away after slight use, if used at all—will not avail for annual labor.—*Honaker v. Martin, 27 P. 397.*

Dumping tailings on a claim is no improvement.—*Jackson v. Roby, 109 U. S. 440.* Traveling and expenses in getting ready to go to work can not be considered.—*McGarrity v. Byington, 12 Cal. 426; 2 M. R. 311; DuPrat v. James, 65 Cal. 555; 15 M. R. 341.* Nor work done by third parties and bought in. —*Little Gunnell Co. v. Kimber, 1 M. R. 536.* But see *post p. 463.*

Taking specimens for assays will not count for annual labor nor as a legitimate resumption of work. —*Bishop v. Baisley, 41 P. 936.* The cost of sharpening tools may or may not be a legitimate item, according to circumstances.—*Hirschler v. McKendricks, 40 P. 290.*

Work Done Outside of Claim or on Group.

Work done beyond the lines will count when it has direct reference to the drainage or development of the claim.—*Packer v. Heaton, 9 Cal. 569; 4 M. R. 447; Kramer v. Settle, 1 Ida. 485; 9 M. R. 561; Mt. Diablo Co. v. Callison, 5 Sawy. 439; 9 M. R. 616; Klopenstine v. Hays, 57 P. 712; 17 L. D. 190.* Whether the work done on one is really for the benefit of the group is for the jury to say.—*Wilson v. Triumph Co. 56 P. 300; Yreka Co. v. Knight, 65 P. 1092.* Where sundry claims are worked together as one group, the development work though confined to a single claim, may count for all.— *Chambers v. Harrington, 111 U. S. 350; Jupiter Co. v. Bodie Co. 11 F. 666; 4 M. R. 413; St. Louis Co. v. Kemp, 104 U. S. 636; 11 M. R. 692; DeNoon v. Morrison, 83 Cal. 163; 16 M. R. 33; 23 L. D. 267.*

There are two cases which hold that the claims must be contiguous in order that work done on one may count for another. *Gird v. California Oil Co. 60 F. 531; 18 M. R. 45; Royston v. Miller, 76 F. 50; 18 M. R. 418.* But *Altoona Co. v. Integral Co. 18 M. R. 410; 114 Cal. 100,* is to the contrary and there is nothing in the wording of the Congressional Act which compels them to be contiguous except in the case of oil placers.

The work may be done on an adjoining patented claim but when done outside the bounds of the claim intended to be protected, the burden of proof is on the party asserting that it was for the benefit of such claim and was done as annual labor for the protection of such claim.—*Hall v. Kearny, 18 Colo. 505; 17 M. R. 594; Sherlock v. Leighton, 63 P. 580.*

The Question of "Benefit to the Claim" can only arise when the work itself was done on some one claim and it is sought to utilize it for the benefit of another claim held by the same party or where it is outside the claim proper in the shape of road, building, ditch, etc. For any work whatever done upon and within the lines of the claim in the nature of mining or preparing for mining is strictly within the terms of the statute. A cross-cut started on the claim, above the vein, intended to benefit a claim further up, would count for work on both claims; upon the claim on which it started because within its lines and for the claim above because driven for its benefit.

Assessment work outside the claim must be of value to the claim intended to be protected. *Little Dorrit Co. v. Arapahoe Co. 71 P. 389.*

Diverse Ownerships in Group or in Tunnel.

Work done by tunnel intended to cut two claims owned by the same person is good to hold both.—*Book v. Justice Co. 58 F. 107.* Work done on one of a group held in different names but really owned in common has been ruled to avail for all.—*Eberle v. Carmichael, 42 P. 95.* And we see no reason why a tunnel owned in common and worked by the joint labor or contributions of the several owners of different claims intended to be cut by such tunnel should not avail to protect each claim provided the full $100 is expended for each claim.—*Fissure Co. v. Old Susan Co. 63 P. 587.*

A blacksmith shop used for the benefit of the claim in controversy, and for other claims, cannot

be counted for annual labor with no proof of how much of its value could be apportioned to the claim in controversy.—*Upton v. Santa Rita Co. 89 P. 276.*

Annual Labor by Tunnel.

See p. 257.

Amount, How Estimated—District Rules.

As to such district rules as attempt to fix the value of a day's labor above its real cost in estimating the amount of work done, they amount to absolutely nothing. The "fiat" does not alter the "fact." The true measure is the real expenditure.—*Wright v. Killian, 64 P. 98; Penn v. Oldhauber, 61 P. 649; Woody v. Barnard, 65 S. W. 100.* And if the work has been done, or the materials furnished by the owner himself, the measure of value is what it would have cost to procure the same labor and materials from a second party. In other words, the market value of the labor and materials.—*Quimby v. Boyd, 8 Colo. 194, 342.* And its enhancing the value of the claim is no test.—*Mattingly v. Lewisohn, 35 P. 111.*

The test is what the work was worth, rather than what was paid for it, but what was paid for it goes to prove its value.—*Stolp v. Treasury M. Co. 80 P. 817. McCormick v. Parriott, 80 P. 1044.* A party cannot put an arbitrary price on his own labor.—*McKay v. Neussler, 148 F. 86.*

The Fact that the Work has Not Yet Been Paid for does not invalidate its sufficiency to count as annual labor.—*Lockhart v. Rollins, 21 P. 413; 16 M. R. 16; Coleman v. Curtis, 30 P. 266.*

Rightful Owner Out of Possession.

Where possession is wrongfully taken and withheld, the rightful owner is excused from the necessity of doing the work.—*Utah Co. v. Dickert Co. 21 P. 1002; Slavonian Co. v. Perasich, 7 F. 331; 1 M. R. 541; Mills v. Fletcher, 34 P. 637; Trevaskis v. Peard, 44 P. 246; Field v. Tanner, 75 P. 916; 32 Colo. 278.*

A relocator cannot take advantage of the fact that the work was not done when prevented by his own act.—*Garvey v. Elder, 109 N. W. 508.*

Performance of Annual Labor After the Year Has Expired—Two Parties Essential to Forfeiture.

The neglect to do the annual labor required by the United States government by no means works a forfeiture of the claim.—*Lakin v. Sierra Buttes Co. 25 F. 343; Lacey v. Woodward, 25 P. 785.* To illustrate: If a lode was located in 1890 and after that year no annual work was done until 1896 (when a period of five full years would have intervened), and in 1896 the owner enters and performs $100 worth of work for that year, he continues to be the owner of the claim, and his title relates back to the original location of 1890; *provided always*, that the lode has not been relocated in the meantime.—*Crown Point M. Co. v. Crismon, 21 M. R. 406; 65 P. 87.*

It requires two parties to make a forfeiture absolute: First, the party who abandons, and second, the party who relocates. The second party therefore must take advantage of the first party's default before such default can enure to the second party's benefit.—*Little Gunnell Co. v. Kimber, 1 M. R. 536; Beals v. Cone, 62 P. 948.*

The fact that failure to do the work does not *ipso facto* work a forfeiture and the fact that advantage of the default must be taken by some adverse party is important in several classes of cases.

First.—Where the work done before the neglect, is necessary to complete the $500 worth of improvements required before patenting.

Second.—Where in a suit of ejectment between two claims it is necessary to prove priority and carry the title back to the original location.

Third.—Where a party has neglected to do his annual work and a third party has entered for purpose of relocation.

Fourth.—The fact that neglect to do one or more years' labor does not, *ipso facto*, operate as a forfeiture, is of special importance in the case of overlapping claims, where the junior claim has been worked and the senior claim has not been worked.

1. Where the Work Done Before the Neglect is necessary to complete the $500 worth of improvements required before patenting.

If failure to do one year's work operates, *ipso facto*, to defeat the location, in such case the title would have to date from the date of resumption; in fact, a new location would have to be made by the owner. But the failure not having been in due time taken advantage of, the old title remains, dates from original discovery, and consequently old work and new count together as improvements on the claim for purpose of patenting.

2. Where It is Essential to Carry the Title Back to Discovery.

The remarks of the foregoing paragraph apply also to this heading. The doctrine of relation carries a title back to the first step in its inception, always excepting where an adverse right has intervened. As the failure of itself works no forfeiture, the continuity in this case is not broken. A location, however, made over a claim where the work has not been done (before *bona fide* resumption by the owner) would break this continuity and would take the conflict, whether it purported to be a relocation of the defaulting claim or only incidentally took some of its ground.

There is a dictum in *Klopenstine v. Hays*, 57 *P. 712*, that if work is resumed by the original owner after failure to do work for a certain year and after a valid relocation by a second party who also failed to keep up his work, that such resumption by the original owner revives the original title. It may be that in such circumstances the original owner may not be required to go through the form of a new location and record; but that his title would go back by relation beyond the point of time

when a valid possessory title to the same ground existed in a third party is an extremely doubtful proposition.

3. Where a Third Party Has Entered for Purpose of Relocation.

The words of the Act relative to the latter class of cases are as follows:

> "Provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

If this location of the third party is complete before the re-entry of the original owner, of course the original owner is too late. If, on the other hand, the original owner has *bona fide* resumed work before the attempted location over his ground, his original title becomes revested the moment he has completed an amount of work equivalent to that required for the previous year. But where the third party has entered, and before he completes his location the original owner also enters and resumes work, the question remains: Is such re-entry of the owner sufficient to defeat the intervening claimant? The Act says that the owner may resume work at any time "before such location." The location of the intervenor is not complete until he has done a series of acts, usually requiring several days to consummate. The locator must sink a shaft ten feet in depth, and set his stakes. In the meantime has the original owner the right to resume work? It was so decided in the case of *Pharis v. Muldoon, 75 Cal. 284; 15 M. R. 348.* There, however, the relocator had entered and posted his notice just after midnight of the last day of the year and the original owner resumed work by the usual hour for honest labor on the morning of the first. The relocator had barely a technical case, if any. In another instance, on facts much stronger for the second party *(Gonu v. Russell, 3 Mont. 358; 12 M. R. 630)*, it was distinctly held that the re-entry of the original owner before the newcomer's location was completed, would save the forfeiture. The same

court reaffirms this ruling in *McKay v. McDougall, 64 P. 669.*

On the contrary, HALLETT, J., in the case of *Little Gunnell Co. v. Kimber, 1 M. R. 536,* held that the party attempting to take up abandoned property has the same period of three months to complete his location, which is allowed by law to a discoverer; and *Pelican Co. v. Snodgrass, 9 Colo. 339,* is to the same effect.

We have little doubt of the correctness of the latter opinion. "The condition of development should be attached to every mine; and courts should, as far as consistent with legal principles, maintain the construction of mining customs which accomplish this end."—*King v. Edwards, 1 Mont. 235; 4 M. R. 480; Russell v. Brosseau, 65 Cal. 605.*

In *Belcher Co. v. Deferrari, 62 Cal. 160,* plaintiff, the original owner, did only one-half the required amount in 1880. In January, 1881, he did $24 worth of work on two claims. Defendant relocated in August, 1881. Held, that the plaintiff had resumed work and was entitled to recover. Such a decision is only trifling with the law and the rights of parties based on the law. On a case of like facts the contrary has since been held by the same court.—*McCormick v. Baldwin, 37 P. 903.*

In the well considered opinion in *Honaker v. Martin (Mont.), 27 P. 397,* the cases on this subject are reviewed by BLAKE, C. J., and it was decided that where a resumption takes place it must be substantial, and result in the prompt performance of at least the full amount which should have been done the previous year. It does not decide in terms as in the Pelican case and Gunnell case, that the resumption is too late when the first act of relocation has been initiated, but it bears out the argument to the same result.

The owners of the Nellie were on the ground December 31, and resumed work on January 1. The same day the Equator was located over this ground. The Court held that such location could not be in-

itiated while the ground still remained unforfeited, the owners having resumed the work, though they afterwards failed to complete the full assessment.—*Jordan v. Duke, 53 P. 197.*

Labor when resumed must be prosecuted with reasonable diligence till the $100 is complete.—*Hirschler v. McKendricks, 40 P. 290.*

Where a claimant is at work on the last day of the year intending to continue work on the next day, a party who locates before the usual hour to start work is a trespasser.—*Willitt v. Baker, 133 F. 937.*

4. Work Neglected on Senior Claim Overlapped by Junior Claim.

Where a local statute provides for filing relocation certificate to take in the overlap of the senior claim, which has become abandoned, we have no doubt that such filing is necessary to give it to the junior claimant. Even without such statute it was generally conceded that the failure did not *ipso facto* give it to the junior claimant.—*1 Lindley 2d Ed., Sec. 363; 1 Snyder, Sec. 574.* It was so expressly decided in *Oscamp v. Crystal R. Co. 58 F. 293.* In numberless instances the two claimants, being on friendly relations, the junior claimant has no desire to take advantage of the failure of the senior claimant to do his work for a single year. Does the law then give it to him against his will? It is true there was a dictum in *McPherson v. Julius, 95 N. W. 235* to that effect, but all other authority was against it, until the case of *Lavagnino v. Uhlig, 198 U. S. 443* was decided in 1904. The Court there held that the Uhlig lode, located over the Levi P. lode, and therefore not valid as to the overlap, took the overlap upon failure of the Levi P. to do its work for a certain year, and cut out the Yes You Do lode, which had been located immediately after the expiration of the year of such failure. The opinion is obscure and cannot be reconciled with the later case of *Brown v. Gurney, 201 U. S. 184,* where, also, there were three successive locations, and the Court held that no relocation became effective unless initiated

after the prior location had been abandoned. The Supreme Court of Utah in *Lockhart v. Farrell, 86 P. 1077*, cites both decisions and follows the latter.

The Relocator No Trespasser.

When the year has expired and the work has not been done a third party has the right to enter within its boundaries and relocate the claim, although the original owner be still (constructively) in possession.—*DuPrat v. James, 65 Cal. 555; 15 M. R. 341; Brown v. Oregon King Co. 21 M. R. 485; 110 F. 728.*

A Relocation Begun Before the Year Expires Is

void.—*Belk v. Meagher, 3 Mont. 65; 1 M. R. 522.* See pp. 37, 490.

Equity of the Annual Labor Law.

The opposition to the requirement of annual labor so evident when first required has long since yielded to a concession of its equity even in the case of claims located before its passage.

The holder has no just right to prevent the government disposing of such claims as he is unwilling or unable to work, to such as are ready to assume the risk and develop the deposit, the estate of the holder not being absolute, but by implied contract and general mining custom conditioned upon development; of which development the Government has merely fixed the amount by the Act of 1872, and that at a reasonable limit.

Development is the condition upon which the Government allows the miner to hold his possessory title and afterwards perfect it by patent.—*Erhardt v. Boaro, 113 U. S. 527; 15 M. R. 472; O'Reilly v. Campbell, 116 U. S. 418; Kramer v. Settle, 1 Ida. 485; 9 M. R. 561.* Nevertheless the Act is to be strictly construed against forfeiture.—*Emerson v. McWhirter, 65 P. 1036.*

It is no objection to testimony to disprove annual labor that it is negative in character; it is necessarily so. The evidence reviewed and held to outweigh the positive testimony that it was done.—*First Nat. M. Co. v. Altvater, 149 Fed. 393.* Evidence reviewed and held proof of labor performed.—*Smith v. Mt. Gulch Co. 85 P. 918.*

Neglect to do the work forfeits the claim, although the locator remains in possession.—*Goldberg v. Bruschi (Cal.), 81 P. 23.*

As to the Plea of Forfeiture for failure to perform see page 94. In adverse claim suits, page 487.

The Burden of Proof is upon the party asserting that the work was not done.—*Quigley v. Gillett, 35 P. 1040; Hall v. Kearny, 18 Colo. 505; 17 M. R. 594; Harris v. Kellogg, 49 P. 708; Axiom Co. v. White, 72 N. W. 462; Beals v. Cone, 62 P. 948.* And the proof should be clear and convincing.—*Strasburger v. Beecher, 49 P. 740; Dibble v. Castle Chief Co. 70 N. W. 1055; Crown Point Co. v. Crismon, 65 P. 87; Upton v. Santa Rita Co. 89 P. 275; Gear v. Ford, 88 P. 600.* As to burden of proof when the work was done outside the claim, see p. 101.

On Rebuttal the other side may show that the work did not benefit the claim. But the work done need not be that which would be most beneficial to the claim.—*Sherlock v. Leighton, 63 P. 580.*

Proof that the labor in question had been applied as improvements on application for patent on another claim is admissible.—*White River Co. v. Langston 76 Ark. 420; 88 S. W. 971.*

Proof of Annual Labor.

R. S. Colo. Sec. 4209.—Within six months after any set time or annual period allowed for the performance of labor or making improvements upon any lode claim or placer claim, the person on whose behalf such outlay was made, or some person for him, may make and record in the office

of the recorder of the county wherein such claim is situate, an affidavit in substance as follows:

The continuation of same section contains a form, same as on page 112, and makes the affidavit, or a certified copy of it, *prima facie* evidence of the performance. The object of the section is to provide a convenient method of preserving proof of the labor performed by making the affidavit *prima facie* evidence of the fact.—*Coleman v. Curtis, 30 P. 266.*

Like acts exist in most of the other States and Territories, the time for filing the certificate being: in Arizona within three months; California and Washington within 30 days; Idaho and New Mexico within 60 days after the period allowed for performance. In Montana 20 days, Nevada and Wyoming 60 days, Utah 30 days after completion of work.

The special A. C. of 1907 for Alaska covering this matter of proof of labor is printed on p. 502.

Failure to File Affidavit of Labor.

The neglect to file proof of labor, if the labor has in fact been done, would not leave the lode open to relocation, and the doing of the labor can be shown by oral testimony.—*McGinnis v. Egbert, 8 Colo. 41; 15 M. R. 329; Book v. Justice Co. 58 F. 118; 17 M. R. 617; Murray Hill Co. v. Havenor, 66 P. 762.* But the precaution to file should by no means be neglected. The filing makes out the proof of the fact of the labor being done, which might afterwards be a difficult matter to show.

The California Act of 1891 purported to make the filing obligatory.—*Harris v. Kellogg, 49 P. 708,* and in Idaho the failure to file is *prima facie* evidence that the work has not been done.

The great objection to annual labor, with the professional mind, is that it throws a mining title upon constant parol proof, takes it out of the chain of title as found recorded, and makes it depend upon the ex-

istence of facts which do not appear of record. This evil should be obviated as far as possible by precautions, such as are above suggested; but, after all, the result remains, that no claim can be considered secure until a patent is obtained, and the title taken out of the class of conditional estates.

FORM OF AFFIDAVIT OF LABOR PERFORMED.

STATE OF COLORADO, *Summit* County: ss:

Before me, the subscriber, personally appeared *I. P. Lambing*, who being duly sworn, saith that at least *one hundred* dollars' worth of work or improvements were performed or made upon the *Chaos Lode*, situate on *Silver* mountain, in *Avalanche* Mining District, County of *Summit*, State of Colorado, between the first day of January, A. D. 1907, and the thirty-first day of December, A. D. 1907. Such expenditure was made by or at the expense of *Robert W. Foote*, owner (or one of the owners) of said claim, for the purpose of complying with the law and holding said claim. I. P. LAMBING.

Sworn and subscribed before me this *second* day of *January*, A. D. 1908. *James W. Swisher*,
[SEAL] Notary Public.

A single affidavit may be filed for the labor on several claims.—*McGinnis v. Egbert, 8 Colo. 41; 15 M. R. 329.* And it may be filed before the year elapses.—*Id.*

Certificate in Lieu of Annual Labor.

In 1893 and 1894 Congress passed Acts suspending for each of those years the requirement of annual labor, provided the claimant recorded a notice of his intention to hold and work the claim.—*28 St. L. 6; 114.* In both Acts South Dakota was excluded.

Each of the Acts required the record to be made during the year for which it was to have effect. But a certificate filed in 1894, although neither work was done nor certificate filed for 1893, would hold the claim if it had not been in the meantime relocated. The act of filing the certificate provided for, was accepted by the statute the same as the performance of the work and if filed at any time during the period

allowed, would prevent a lawful relocation of the claim by third parties.

There can be no forfeiture for failure of co-tenant to contribute his proportion of expenditure for 1893, when he has filed the certificate allowed by the Act, even where the work had been done before the Act was passed. There is no vested interest in a right to enforce a penalty.—*Royston v. Miller, 76 F. 50.*

When the Ground is in Litigation the court may appoint a receiver to see that the work is performed and a forfeiture prevented.—*Nevada Co. v. Home Co. 98 F. 673.*

It is not contempt of a mining injunction to perform the amount of labor necessary to save the claim from forfeiture.—*Silver Peak Mines v. Hanchett, 20 M. R. 19; 93 F. 76.*

A party made a new location over an older claim which he afterwards purchased. Held, that the work done on the new location could be treated as annual labor for the protection of the older title.—*Johnson v. Young, 18 Colo. 630.*

ANNUAL LABOR ON PLACERS.

Judicial Rulings As to Labor on Placers.

The question of annual labor on placers is a curious instance of the growth of law by following the first judicial oversight as a precedent until the wrong interpretation is firmly rooted as the true one. By no fair construction of the Act of 1872 could it be applied to anything except lode claims. The very amount of the labor was fixed by the number of feet "in length along the vein." But in 1876, in *Chapman*

v. Toy Long, 4 Sawy. 28; 1 M. R. 497, placers were referred to incidentally as subject to the labor law. In *Jackson v. Roby, 109 U. S. 440*, without argument, the same *dictum* was expressed. Later, in *Carney v. Arizona Co. 65 Cal. 40*, the point was definitely made as to whether such labor was required on placers, and the Supreme Court of California, basing their opinion on the force of the general terms of § 2329—a section enacted two years prior to the annual labor section—sustain the affirmative of the proposition. In *Sweet v. Webber, 7 Colo. 443*, the precedents thus established were followed without reference to the original statute.—*Morgan v. Tillotson, 15 P 88.*

A single record of a placer claim, whether of 20 acres by one person or 160 acres by eight persons, is a full claim and requires $100 annual expenditure to protect it and $500 to patent it. In other words a 20 acre claim requires as much annual labor and patent expenditures as a 160 acre claim.

The Forms of affidavit, notice and proof of forfeiture given for lode claims will apply with obvious alterations to placers.

Void State Legislation.

In 1879 the Legislature of Colorado passed an Act fixing the amount of annual labor on placers, altering the period during which it was to be performed, and providing for forfeiture of the delinquent co-owners' interest. It was declared in conflict with the Congressional Act in attempting to lessen the annual expenditure in *Sweet v. Webber, 7 Colo. 443.* It is obviously so in its attempt to interfere with the beginning and end of the annual period. All the other provisions of the section are superfluous where they agree with the Act of Congress and nugatory where they conflict with it.

Special A. C. as to Group Oil Claims.

That where oil lands are located under the provisions of title thirty-two, Chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: *Provided*, That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims.— *Feb. 12, 1903. 32 St. L. 825.*

FORFEITURE TO CO-OWNER.

By Failure to Do Annual Labor—Notice.

R. S. Sec. 2324. * * * —Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.—*Sec. 5, A. C. May 10, 1872.*

Expenditures in Excess of the Statutory Amount.

Although one co-owner has expended more than enough to hold the claim, the delinquent co-owner, to save forfeiture under the Act of Congress, is only required to pay or tender his proportion of the amount which the law required to be expended upon the claim.

The recovery of his proportion of additional expenditures depends upon other grounds, and is to be enforced only by judicial proceedings, involving the question of mining partnership, or the expressed or implied assent of the co-owner to the expenditure of the additional amount.—*5 L. O. 4; Neuman v. Dreifurst, 9 Colo. 228; McCord v. Oakland Q. Co. 64 Cal. 134; 49 Am. R. 689.* The distinction is clearly expressed in *Holbrooke v. Harrington, 36 P. 365.*

If There Are Three Owners and One Performs all the labor, and gives notice to his co-owners, and one of them pays his proportion and offers to pay one-half and join in the division of the forfeited interest of the third party, we apprehend the second party may refuse such proposition. The forfeiture accrues solely to him who has performed the labor.—*31 L. D. 178.*

Estoppel.

When a co-owner is delinquent, but the party who has made the expenditure afterwards associates with him in developing the claim, it would probably be considered a waiver of the forfeiture.

Preservation of Proof.

The presumption in law is always against forfeiture, and the party who asserts it must be prepared to make his proof in such case.—*Turner v. Sawyer, 150 U. S. 578; 17 M. R. 683.*

Amount and Place of Expenditure.

Where a forfeiture notice covered two claims it was held void for not stating the "amount of money spent upon each claim *nor the facts which might excuse expenditure upon each claim.*"—*Haynes v. Briscoe, 67 P. 156.* The clause in italics we apprehend refers to the possible case of group work where the full amount might have been expended on a single claim.

Choice Between Personal Service and Publication.

If the demand is made by personal service of the forfeiture notice the delinquent must comply within ninety days from date of service. If publication be made the forfeiture is not complete until ninety days after the last publication.

If publication be attempted it can not be turned into personal service by showing that copies of the paper were sent to and received by the party in default.—*Haynes v. Briscoe, supra.*

Nearest Newspaper.

As to what is the "newspaper published nearest the claim" the construction followed by STEELE, J., in *Haynes v. Briscoe*, seems to be clearly right; to wit, that it means nearest in a direct line, and not by the usually traveled route.

Length of Publication.

Publication for 13 weeks was held sufficient in *Elder v. Horseshoe Co. 87 N. W. 586; aff'd 194 U. S. 248.*

Proceedings to Enforce Forfeiture.

In the first instance file the usual affidavit of labor performed, in the form given on p. 112.

FORFEITURE NOTICE. (A)

GEORGETOWN, COLO., January 3, 1908.

To Robert H. Tinker:

You are hereby notified that I have expended during the year 1907 *one hundred dollars* in labor and improvements upon the *Corinne Lode* Mining Claim, situate on *Republican Mountain* in *Griffith* Mining District, County of *Clear Creek*, State of Colorado, the location certificate of which is found of record in *book 20, page 222*, in the office of the recorder of said county, in order to hold said claim under the provisions of section 2324 of the Revised Statutes of the United States, and the amendment thereto approved January 22, 1880, concerning annual labor upon mining claims, being the amount required to hold said lode for the period ending on the 31st day of December, A. D. 1907. And if, within ninety days from the personal service of this notice, *or within ninety days after the publication thereof*, you fail or refuse to contribute your proportion of such expenditure as a co-owner, which amounts to fifty dollars, your interest in the claim will become the property of the subscriber, your co-owner, who has made the required expenditure, by the terms of said section.

JAMES H. PERSHING.

If the demand contained in this Forfeiture Notice is not complied with, within the prescribed period, it should be recorded after making proof of its service or publication, which can be most readily done by endorsement upon the Notice "A" as follows:

PROOF OF FORFEITURE. (B)

STATE OF COLORADO, County of *Clear Creek:* ss.

James H. Pershing, being duly sworn, saith that he served the within forfeiture notice upon *Robert H. Tinker,* the delinquent co-owner therein named, upon the *17th* day of *March, A. D. 1908,* at said county, by delivering to him a true copy of the same and explaining the contents thereof; and that the said *Robert H. Tinker* wholly failed to comply with the demand contained in said notice or to pay or tender his proportion of said expenditures during the period of ninety days after said date or at any time since hitherto.

JAMES H. PERSHING.

Sworn and subscribed before me this *first* day of July, A. D. 1908.

John Tomay,
[SEAL] Notary Public.

The above form completes the proceeding where the notice has been personally served, but where it has been by publication, discard the form "B" and use the following "C" and "D."

PROOF OF PUBLICATION. (C)

STATE OF COLORADO, County of *Clear Creek:* ss.

(*Copy of Notice "A" Attached.*)

Jesse Randall, being duly sworn saith, that he is the publisher of the *Georgetown Courier,* a weekly newspaper published in said county, and that said *Georgetown Courier* is the newspaper published nearest to said *Corinne* Lode Claim, and that the above notice was published in said paper fourteen successive weeks, the first publication appearing in the issue of *January* 7, *1908,* and the last publication in the issue of *April 8, 1908.*

JESSE RANDALL.

Sworn and subscribed before me this *tenth* day of *April, A. D. 1908.*

John Tomay,
[SEAL] Notary Public.

Upon the publisher's proof (C), the party who has done the work will endorse his affidavit of non-payment as follows:

AFFIDAVIT OF NON-PAYMENT. (D)

STATE OF COLORADO, County of *Clear Creek:* ss.

James H. Pershing, being duly sworn saith that *Robert H. Tinker,* the person named in the forfeiture notice attached to the within proof of publication, wholly failed to comply with the demand contained in said notice or to pay or tender his proportion of said expenditures, during

the period of said notice or within ninety days thereafter, or at any time. JAMES H. PERSHING.

Sworn and subscribed before me this *tenth* day of *July, A. D. 1908.* *John Tomay,*
[SEAL] Notary Public.

These forms "A" and "B," in cases of personal service, and "A," "C" and "D" in cases of advertisement, complete the forfeiture and place its proof in a shape where it is recognized in all land office proceedings as the equivalent of a deed from the delinquent party; but when the forfeiture has to be proved in court, these *ex parte* proceedings would not be recognized, except the publisher's proof (if this proceeding can be considered as an advertisement required by law) which is in Colorado made evidence by statute R. S., §2503. Similar procedure for proof of statutory publication is provided by statutes generally.

The forfeiting party is not bound by law to make record proof of the forfeiture except as it may be required by the practice of the Land Office.—*Riste v. Morton, 49 P. 656.*

Minor Heirs—Grouping Notice.

In *Elder v. Horseshoe Co. 21 M. R. 510; affirmed in 194 U. S. 248,* it was held that the failure of a cotenant to pay for his share of the work was a breach of the condition under which he held title; that there was no saving of the rights of minor heirs; that a notice of forfeiture for several consecutive years was valid and that it was optional to serve personal or publish a printed notice of forfeiture.

A Party Not a Co-Tenant at Time of Notice can not be deprived of an after acquired title by such notice. Even a patent procured by the forfeiting title will stand to the use of such party.—*Turner v. Sawyer, 150 U. S. 578; 17 M. R. 683.*

The attempted forfeiture is a void proceeding where his share of work has been in fact done by the co-tenant alleged to be in default.—*Brundy v. Mayfield, 38 P. 1067.* Or where the forfeiting co-

tenant did not in fact do the labor.—*McKay v. Neussler, 148 F. 86; Delmoe v. Long, 88 P. 778.*

A forfeiture notice is not good against a co-owner not named in the notice.—*Ballard v. Golob, 34 Colo. 417; 83 P. 376.*

It has been held that the regularity of the forfeiture can not be questioned by third parties representing a title hostile to the claim where the alleged forfeiture to co-owner was asserted.—*Becker v. Pugh, 17 Colo. 243.*

If a co-owner who has performed the labor, sell his interest before completing forfeiture proceedings, whether his assignee can forfeit is an open question; but the language of the Turner case that the right is limited to a co-owner who has performed the labor, would seem to be against such right.—See *31 L. D. 178.*

But in *Badger Co. v. Stockton Co. 139 F. 838*, where the performing co-owners had conveyed their claim to a corporation taking its stock for consideration the forfeiture perfected by the corporation was upheld.

In *Forderer v. Schmidt, 143 F. 475*, a friend of the party who was being advertised out offered to pay the amount due, which tender was approved by the party as soon as he learned of it: Held that the tender defeated the forfeiture.

RELOCATION OF ABANDONED CLAIMS.

Statutory Regulation of Such Relocation.

R. S. Colo. Sec. 4211.—The relocation of abandoned lode-claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the re-locator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or

any part of the new location is located as abandoned property.—*Sec. 16, Feb. 13, 1874.*

The Old Claim Must First Be in Default.

This is the basis of the right to relocate.—*Garthe v. Hart, 73 Cal. 541; 15 M. R. 492; Lockhart v. Rollins, 21 P. 413; 16 M. R. 16.* Two locations can not legally occupy the same space at the same time. —*Porter v. Tonopah Co. 133 F. 756.*

Admits a Prior Hostile Claim.

Where the record on its face purports to be a relocation of the claim of a stranger, this amounts to an admission that the old claim had once a legal existence, and an assertion that it has become open to forfeiture.—*Wills v. Blain, 20 P. 798; Shattuck v. Costello, 68 P. 529.* The burden of proof is upon the relocator.—*Providence Co. v. Burke, 57 P. 641; Zerres v. Vanina, 134 F. 610.*

The term "relocation" implies that there was a former location and the use of the word estops the user to deny a valid prior location.—*Jackson v. Prior Hill M. Co. (S. Dak.) 104 N. W. 207; Slothower v. Hunter, 88 P. 36.*

Form and Manner of Relocation.

In the relocation of abandoned claims, the party locates and records with the same particularity as in making an original location or record. The only practical distinctions are that he may, if found standing, adopt the stakes of the old claim. And his discovery shaft may be by sinking the old one deeper. He has the same rights as an original discoverer, although not in strictness a discoverer at all. —*Armstrong v. Lower, 6 Colo. 393; 15 M. R. 631; Pelican Co. v. Snodgrass, 9 Colo. 339.*

It has been held that a relocation can not be made on a blind working—a drift which has been run underground from the bottom of the shaft on an adjoining claim.—*Little Gunnell Co. v. Kimber, 1 M. R. 536.* *See page 44.*

The fact of improvements already on the ground does not lessen the labor required from the relocator; he must do the required amount of sinking, usually ten feet, on the old, or on a new discovery shaft; must erect a new location stake or at least change the notice on the old stake and must re-stake the claim unless he adopts exactly the lines and boundaries of the old location.

The stakes of the old claim may be adopted as the stakes of the new.—*Conway v. Hart, 62 P. 44; 21 M. R. 20. Brockbank v. Albion Co. 81 P. 863.*

But in *Moffatt v. Blue River Co. 80 P. 139,* and *Miller v. Chrisman, 73 P. 1083,* where in each instance an attempt had been made to jump a valid prior claim in the actual possession of its owner by adopting its stakes and filing a record on the boundaries set by the first party the second attempted location was held a vain proceeding.

The relocator must set new posts or at all events must see that his boundaries are established on the ground. Where the old stakes are taken they should be marked with the new name.

A second party has a right to enter upon ground although he knows of an attempted prior location upon it, if such prior location be fatally defective.—*Brown v. Oregon Co. 110 F. 728; Deeney v. Mineral Co. 67 P. 724.* But if he enters as a relocator he can not assert defects in the original notice. *Yosemite Co. v Emerson, 28 S. C. R. 196.*

No Connection With the Old Title.

The relocator has no rights by relation to the date and priority of the title which he has destroyed by his relocation.—*Cheesman v. Shreeve, 40 F. 789; 17 M. R. 260.*

Reference in Location Certificate to Old Title.

By statute in several States in the relocation of forfeited or abandoned claims, the location certificate is required to state if the whole or any part of the new location is located as abandoned property. In Montana and Nevada such requirement is permissive,

but if relocation is made by sinking the original discovery shaft deeper, the location certificate in the latter State must give the depth and dimensions of the original shaft at date of relocation.

Cunningham v. Pirrung, 80 P. 329, rightly adjudged that the Arizona Statute had no application where the prior location was not in fact a *valid* one. But it went further and said that the burden of proof was on the second location to show that the overlapped prior location was not valid. Except where by estoppel or from the pleadings there is an admission of the existence of a prior and once valid claim we can not see why such burden should be so shifted.

In *Matko v. Daley, 85 P. 721*, the Arizona Supreme Court held the record void for such non-recital, but in *Kinney v. Lundy, 89 P. 496*, qualified the ruling to make it voidable only and therefore open to amendment. The statute itself was repealed in 1907.

The Act requiring such recital does not require mention of a location never completed.—*Paragon Co. v. Stevens Co. (Wash.) 87 P. 1068.*

All such statutes are useless and produce only embarrassment. A prospector finding old works or notices may be in entire ignorance as to whether they represent a perfected claim or an unperfected prospect.

Where the language of such statutes will possibly permit, they ought to be held directory merely, not mandatory, and thus no loss of title from non-compliance would follow.

Re-Entry by Original Owner.

After the annual period has expired, the old claimant has still the first right; but if he has commenced work before another party enters, he must complete the full amount required with reasonable diligence, as otherwise the claim would remain forfeit.—*Honaker v. Martin, 27 P. 397.* And after the relocator has entered he has the right to maintain his possession.—*Morgan v. Tillottson, 73 Cal. 520.*

In *Field v. Tanner, 75 P. 916*, a party attempted to relocate for failure of owner to do his annual work. After his purported relocation the owner re-entered and did the work and recovered because of defects in the relocation, to wit: shortage in the depth of the discovery shaft.

When the Original Owner Had Begun Work before the expiration of the year and so being not yet entirely in default was at work on December 31st —an entry by a relocator on January 1st (a Sunday) or on January 2 (a legal holiday) will not initiate a valid claim.—*McNeil v. Pace, 3 L. D. 267. Fee v. Durham, 121 F. 468.*

Relocating Instead of Resuming.

In *Warnock v. De Witt, 40 P. 205*, the Supreme Court of Utah decide in terms that an owner may allow his claim to be in default as to annual labor and then renew his monuments, file a new record and hold under such second location. It cites the case of *Hunt v. Patchin, 35 F. 816*, as upholding such relocation. This Hunt case was a controversy between co-owners where the rights of strangers or of a hostile title were not involved and does not justify the citation.

The law requires the owner to do a certain amount of work within a certain period. It allows him the indulgence of retaining his old title if he re-enters and resumes work either during such period or during the next year before another has entered. To allow him from year to year to renew his monuments and file new records would result in wholly defeating the intent of the law. We think that there is an implied distinction between his rights and the rights of others in such a case. He has forfeited the right to locate that ground by virtue of his default in not living up to his assumed obligation to follow up his location by labor in good faith. The claim is open to relocation by all citizens barring the one whose default is the occasion of its being open and his only rights are those conferred on him by the Statute to wit: the right to resume and

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perform. Mr. Lindley fully coincides with these views.—*1 Lind.* § *405.*

There is a legislative construction to the same effect by the insertion at the proper context of the words "open to location *by others*" in the Special Act concerning Annual Labor on claims in Alaska. P. 502.

Relocation After Patent Applied For.

In *South End M. Co. v. Tinney, 35 P. 89*, a lode had applied for patent and completed its publication, but considerable delay ensued without entry and the annual labor was not kept up. During this period a relocation was made. Afterwards the applicant completed his entry, but it was held that the relocation title was valid and that the patentee took the patent in trust for the true owner, the relocator. There would seem to be no doubt that the annual labor must be kept up until actual entry, but whether other courts will go to the extreme of this holding is not to be assumed. MURPHY, C. J., dissented, as did BELKNAP, J., in part. *See page 98.*

In Land Office proceedings the party asserting a relocation must prove an abandonment of the original claim.—*21 L. D. 219.* Or the original application may be cancelled for laches. *See page 467.*

Overlapping Senior Claim.

It has been held that the filing of amended certificate giving such bounds as include the interference of a prior survey which has failed to have its annual labor performed operates as a relocation of such abandoned overlapping area without specific mention of such being the intent of the amendment. —*Johnson v. Young, 18 Colo. 625.* *See page 108.*

Where the Court had decided that neither claimant to the mine had title, a relocation by one of the parties after such adjudication was held valid.—*Lauman v. Hoffer, 79 P. 953.*

Relocation of Abandoned Claim by Co-Tenant.

Where the several owners of a claim have allowed the annual period to expire without doing the

annual labor, it has been asserted that any one of them may enter upon the ground and relocate the claim in his own name, leaving out his former co-tenants. The Statute says that after the year has expired without the labor being done, the claim

"Shall be open to relocation in the same manner as if no location of the same had ever been made."—*R. S. Sec. 2324.*

But these words are immediately followed by a *proviso* which seems to make a distinction between the rights of the old owners and the rights of strangers, and there is an inherent distinction arising from their joint ownership. It is certain that if all the owners return to the claim their title would relate back to the original discovery; and it is also a rule of law that a tenant in common can not rightfully do any act which is subversive of his co-tenant's title, and quite as certain that if he were allowed to relocate as a stranger he must yield his prior claim absolutely, and proceed in all particulars as an entire stranger.

The question has been set at rest by repeated decisions that any relocation or attempted relocation made by a co-tenant is for the benefit of the common title and one co-tenant cannot by recording in his own name oust his co-tenants.—*McCarthy v. Speed, 77 N. W. 590; Yarwood v. Johnson, 70 P. 123; Perelli v. Candiani, 71 P. 537.*

In *Saunders v. Mackey, 6 P. 361,* a co-owner had agreed to see the work done; he did not do it, and afterwards was a party to a relocation. The court held that the failure operated to defeat the old location, and that the relocation was valid; but intimated that in a proper action the party who had so violated his agreement would be declared to hold the title in trust. A very like case was *Doherty v. Morris, 11 Colo. 12,* where the same ruling was made and the breach of trust not considered on the pleadings. In *Royston v. Miller, 76 F. 50,* it was more broadly held that a co-tenant so acting could take no advantage of his relocation. But it requires no decision to say that if a co-owner promise to do the

assessment work and fail so to do, or if he do it and deny it and collude with a third party to relocate (as was the fact in the Morris case) whatever title he so by fraud obtains must enure to the good of the injured party. In the Morris case, the actual doing of the work was made apparent on the final trial.—*28 P. 85; 17 Colo. 105.*

The case of *Yarwood v. Johnson, 70 Pac. 123*, was much like the *Morris case* in its facts. Plaintiff alleged that defendant, a co-tenant, agreed to do the work and did it. Defendant had relocated, using his brother's name, as soon as the year expired. The Court held that if the work had been done the relocation was void of course, but they further broadly and rightly held that any relocation made by a co-tenant was for the benefit of the common title.

The case of *Turner v. Sawyer, 150 U. S. 578; 17 M. R. 683*, lays down the true principle applicable to the point, to wit: that the co-tenant cannot acquire and hold adversely a hostile title without allowing opportunity to co-tenant to pay his proportion of the cost and take the benefit of the same, and that perfecting patent was the purchase of such a title.—*Suessenbach v. Bank, 41 N. W. 662; Mills v. Hart, 24 Colo. 505; Stevens v. Gr. Cent. Co. 153 F. 28; Delmoe v. Long, 88 P. 778.*

A co-owner attempting to relocate in his own name so as to oust his associates from the title does not abandon his claim to the ground nor forfeit by estoppel his undivided interest in the original claim. —*Hulst v. Doerstler, 75 N. W. 270.*

Other Instances of Fiduciary Relation.

The owners mortgaged their claim, abstained from doing the annual labor, and after the year elapsed, relocated.—*Held*, that they could not so defeat the mortgage.—*Alexander v. Sherman, 16 P. 45; 15 M. R. 638.*

The grantor by quit-claim deed is not estopped to relocate when his vendee fails subsequently to keep up his annual labor.—*Blake v. Thorne, 16 P.*

270. For attempted relocation by vendor after sale see *Minah Co. v. Briscoe, 89 F. 891.*

In *McDermott M. Co. v. McDermott, 69 P. 715,* McDermott had sold the lode to a company in which he became a director. Afterwards the company failed to do its work and the claim was relocated by a third party, who conveyed it back to McDermott. There was no collusion whatever. The company had quit because it could find no pay. The Court held that upon abandonment of the claim by failure to do the labor the ground reverted to the public domain and the relocation was an independent new title having no connection with the old one.

But an agent or other party in a fiduciary capacity cannot relocate for his own benefit.—*Lockhart v. Rollins, 21 P. 413; 16 M. R. 16.* Nor betray the property to a stranger.—*Utah Co. v. Dickert Co. 21 P. 1002.* Nor can a hired prospector say that what he has turned over to his outfitter is his own by a prior title.—*Fuller v. Harris, 29 F. 814.*

Lessees cannot take their lessor's property by going through the form of a relocation.—*Lowry v. Silver City Co. 179 U. S. 196; Brash v. White, 75 P. 445.*

Where all the others have conveyed to one cotenant for the purpose of patenting, any relocation made by him counts for the benefit of his associates, including new ground taken in by his relocation.—*Hallack v. Traber, 46 P. 110.*

A Location Made by an Ex-Employe is not void from the fact that his knowledge that the lode had been followed into vacant ground had been acquired while working for the owners of the adjoining patent.—*Thallmann v. Thomas, 111 F. 277.*

RELOCATION BY OWNER.

In What Cases Owner May Relocate.

R. S. Colo. Sec. 4210.—If at any time the locator of any mining claim heretofore or hereafter located, or his

assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an over-lapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act: *Provided*, That such re-location does not interfere with the existing rights of others at the time of such re-location, and no such re-location or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location.—*Sec. 13, Feb. 13, 1874.*

This section provides an escape from the consequences of loose and careless records; it also gives narrow claims the opportunity to take the full width allowed by the later law; and further, in case a lode is found to be not contained in the original boundaries, it allows the error to be corrected. All former rights are secured with the new privileges, and greater certainty obtained under the relocation.

In a relocation under this section the name of the lode should not ordinarily be changed, and the certificate should show that it is a relocation, and of what lode.

AMENDED OR RE-LOCATION CERTIFICATE.

KNOW ALL MEN BY THESE PRESENTS, That I, *Andrew J. Hughes*, of the City and County of *Denver*, State of Colorado, claim by right of relocation, and this amended certificate of location, *fifteen hundred* feet, linear and horizontal measurement, on the *Kentucky* Lode, along the vein thereof, with all its dips, variations and angles, together with *one hundred and fifty* feet in width on each side of the middle of said vein at the surface; and all veins, lodes, ledges and surface ground within the lines of said claim; 750 feet on said lode running *north* 10 degrees *east* from the center of the discovery shaft, and 750 feet running *south* 10 degrees west from said center of discovery shaft; said discovery shaft being situate upon said lode, within the lines of said claim, in *Silver Cliff* Mining District, County of *Custer*, State of Colorado. Said claim is bounded and described as follows: Beginning at corner No. 1 (*etc., describe as in original location or according to the new lines, if changed, and conclude as follows*):

Being the same lode originally located on the first day of May, A. D. 1894, and recorded on the first day of June, A. D. 1894, in *book 7, page 11*, in the office of the re-

corder of said county. This further certificate of location is made without waiver of any previous rights, but to correct any error in prior location or record, to secure all abandoned overlapping claims, and to secure all the benefits of section 4210 of the Revised Statutes of Colorado. Date of relocation, January 7, 1908. Date of amended certificate, January 8, 1908. ANDREW J. HUGHES.

Nearly all the mining States have adopted statutes similar to the Colorado Act providing for the relocation of abandoned claims, for relocation by the owner, or the filing of amended certificate of location.

But they are only declaratory of the right which any claimant has without the aid of any such statute to amend his own publication of claim.—*Thompson v. Spray, 72 Cal. 528.*

Same Particularity As in Original Location.

The discovery shaft, side and corner posts should be found on the ground before any second record is made, and if the amendment changes the boundaries or is made on account of any previous mistake or irregularity in any act of location the same should be rectified upon the ground before recording. The description in the new certificate will, of course, correspond to the new boundaries.

A new location stake should also be erected at the discovery, if the length or width called for on the original stake is altered, and especially if the name of the claim is changed. In other instances the old stake could be considered as answering all purposes of notice the same as the old discovery shaft which does not need to be sunk to any greater depth if it has already the legal depth.—*Tonopah Co. v. Tonopah Co. 125 F. 390; Becker v. Pugh, 17 Colo. 246.* In fact, no change, whatever, upon the ground is necessary if the original location was perfectly regular, and the only idea in relocating or in filing the amended certificate is to formally appropriate abandoned interferences or to correct mistakes in the record.

When admitted in evidence both the original and relocation certificates are to be construed together. —*Duncan v. Fulton, 61 P. 244.*

The Intent of the Act is:

First, to provide a recognized mode of relieving from the consequences of clerical and other mistakes; *second*, to give to old locations the benefit of the additional width allowed under the A. C. of 1872, and *third*, to allow change of bounds, where the old survey was found to vary from the strike of the lode. —*Seymour v. Fisher, 16 Colo. 189.*

An additional or amended location certificate may be filed on old 3,000-foot claims for mere purpose of more specific description, but such claim can not increase its width and at the same time retain its old length.

A relocation certificate is good for all purposes, although it does not state that it is filed for the specific purpose material to the suit. It will take in abandoned overlap although intention so to do is not expressed on its face.—*Carlin v. Freeman, 75 P. 26; Tonopah Co. v. Tonopah Co. 125 F. 390.*

After Loss of Discovery Shaft.

Where a discovery is made within the lines of an older claim, or the locator suffers his discovery to be patented by a hostile location, he may make a valid relocation of that part of the claim which remains to him upon a new discovery made on clear ground. —*Erwin v. Perego, 93 F. 609; Silver City Co. v. Lowry, 57 P. 11.* Affirmed without discussion of this point in *Lowry v. S. C. Co. 179 U. S. 196.*

In *Treasury Co. v. Boss, 32 Colo. 27; 74 P. 888*, where a new discovery shaft had been sunk to get clear of patented ground on which the original discovery had been made the claim was held valid, although no amended location certificate had been filed and no notice posted at the new discovery. As to the latter point the case was followed in *Ferrum Co. v. McMillen, 32 Colo. 38; 74 P. 461.*

But the ruling that such shifting of discovery shaft without a second record is good, is a dangerous precedent to rely on.

To Reform End Lines.

A relocation may be made so as to make the end lines parallel and place the lode in position to claim extralateral rights.—*Tyler Co. v. Last Chance Co. 71 F. 848.*

Changing Boundaries.

A claim may be swung at right angles if it takes up no ground to which rights have intervened.—*Duncan v. Fulton, 61 P. 244.*

Distinction Between Relocation and Amended Certificate.

In strictness there is a relocation only when some change is made upon the ground, as by changing length, width or boundaries; perhaps also when overlapping abandoned ground is taken. The certificate filed to show such change is a relocation certificate. But if the error is in the papers only, as by a misleading or too vague description, there is no relocation, but only the filing of an amended location certificate. But the terms are not always used with exactness even by the legal profession, all such papers as well as acts being called relocations or relocation certificates, and a misuse of the terms is not generally material.—*Cheesman v. Shreeve, 40 F. 789.*

An amended location certificate may be filed after suit commenced.—*Strepey v. Stark, 7 Colo. 614.*

And in *Butte Co. v. Barker, 89 P. 304,* it was admitted in evidence though not filed till after the trial had begun.

Relation Back and Intervening Claim.

It relates back, where adverse rights have not intervened, to the date of the original location.—*McGinnis v. Egbert, 8 Colo. 41; 15 M. R. 329; Strepey v. Stark, supra.*

In the case of *McEvoy v. Hyman, 25 F. 596; 15 M. R. 397*, and in *Craig v. Thompson, 10 Colo. 517.* the amended record was allowed in evidence and to affect and cut out intervening claimants. In the latter case the intervening claimant was treated as a trespasser who could not initiate rights; in the former the original certificate was treated as a defective but not as a void instrument.

The same ruling was followed in *Cheesman v. Shreeve, 40 F. 787*, stating in terms that an amended record related back to the date of the original record.

In the Colorado Statute above printed there is an express saving of intervening rights. But such exception is superfluous because vested rights save themselves. There is no doubt that an amended record, the land office entry, the patent, every successive incident toward perfecting title, relates back to the first step taken toward obtaining such title. But notwithstanding what might be gathered from the wording of the decisions, to such effect taken alone, they are to be read in connection with the fact that the doctrine of relation cannot be invoked to work injustice to third parties.—*Gibson v. Chouteau, 13 Wall, 101.* And if a location or location certificate was so defective as to be void, or so irregular that it allowed strangers to become legal locators of the same ground, in such cases an amended certificate or a relocation will not relate back so as to cut out such intervening locators.—*Hall v. Arnott, 22 P. 200; Jordan v. Schuerman, 53 P. 579; Deeney v. Mineral Co. 67 P. 724; Morrison v. Regan, 67 P. 956; Brown v. Oregon Co. 110 F. 728.*

New rights cannot be acquired by relocation inconsistent with the intervening rights of others.—*Bunker Hill Co. v. Empire S. Co. 134 F. 268; Butte Co. v. Barker, 89 P. 302.*

Where Original Record Was Voidable Only.

In *Moyle v. Bullene, 7 Colo. App. 308*, the very tenable distinction is made that where the original location certificate was so "defective as to absolutely fail to comply with the statutory requirements" it

was void and the amended record would not relate back; but if the original paper was only lacking in technical detail the two should be construed as of the date of the first, and both construed together according to the doctrine of relation. But in *Frisholm v. Fitzgerald, 53 P. 1109*, where a record contained no reference at all to a natural object or permanent monument and was not only constructively void for non-compliance with the Congressional Act, but was declared void in terms by the Colorado Statute, the relocation was held to relate back to the original record and to cut out an intervening title.

The opinion in the case is peculiar in this, that it is the personal view of one judge, and both of his associates refused to concur. It is not the opinion of a Court, and therefore has no obligation as a precedent binding the nisi prius courts of that state. Nothing in the case or the reasoning on which it is based shakes our conclusions as stated in the preceding paragraph, and we consider untenable the proposition that any amendment can cure a void record as against an intervening location.

Will Not Cure Want of Discovery.

In most of the cases above cited the point was one of objection to the form or contents of the original Location Certificate—that is, to the papers in the case—not the merits of the discovery or the location proper, but in *Beals v. Cone, 62 P. 949*, there was no discovery when the original record was made. The second claimant had a valid discovery before the first had any discovery, and the court held that the intervening claimant took the ground and that the subsequent discovery on the prior claim could have no relation back.

An amended location made by a party who has parted with his title will not be recognized.—*Gray Copper Lode, 18 L. D. 536.*

The Official Survey Corrects the Errors of the original location and its stakes and corners need not be identified with the locator's survey.—*Howeth v. Sullenger, 45 P. 841.*

Changing Names of Locators on Notices—Transfers Before Record.

After a record is made based on a valid location, the possessory title becomes perfect as and for and subject to the conditions of a possessory title. —*Gwillim v. Donnellan, 115 U. S. 45; 15 M. R. 482.* But before record it is not unusual for prospectors to settle their rights among themselves by the primitive but practical method of adding or erasing names from the discovery notice. Names cannot be so erased without the assent of the parties to the destruction of the right vested by putting them there in the first instance.—*Thompson v. Spray, 72 Cal. 528.* But this is matter of complaint only by the parties injured and strangers to the title cannot take advantage of such things.—*Thompson v. Spray, supra; Omar v. Soper. 11 Colo. 380; 15 M. R. 496.*

In *Doe v. Waterloo Co. 70 Fed. 4,* it was held that a verbal transfer of an interest in a title not yet recorded was valid and that the new associate taken in by the prospector could complete the location for their joint benefit.

Where new parties become transferees of an uncompleted or an irregularly completed location they have the right to perfect the record in their own names.—*Miller v. Chrisman, 73 P. 1083; Tonopah Co. v. Tonopah Co. 125 F. 389.*

Change of Name of Lode.

It is not infrequent by filing amended location certificate and posting amended notice on the claim, to change the name of the lode.—*Butte Co. v. Barker, 89 P. 302.* Where names such as decency forbids have been placed on record the Land Office has declined to patent the lode by name. In such instances, or even where the name is objectionable only for

sentimental reasons, where all parties interested consent, a change of name is certainly legal.—*Seymour v. Fisher, 16 Colo. 197.* But when done, as it has been, in instances, preparatory to application for patent with intent to mislead and forestall an anticipated adverse claim, or preparatory to intended forfeiture publication, there could be no stronger circumstance from which to draw the inference of fraud.

The Edith lode was located 1,200 feet in length. Discovering that there was 200 feet of vacant ground the Edith owners made a new location 1,400 feet long, calling it the Kirby lode. The Court held that the second location was a relocation of the first and a valid claim.—*Shoshone Co. v. Rutter, 87 F. 801.*

UNITED STATES PATENT.

Policy of the Government As to Mineral Lands.

The policy of the United States has always been to pass the fee simple title to its lands to the ultimate purchaser, but to encourage offers to purchase from settlers and improvers only. To extend this policy into a system of land tenure it first gives a general license to prospect and discover mineral value—passing then to the discoverer the sole right to possess and use, and finally grants the title in fee after due proof of occupation and improvement.

A temporary departure from this rule in taking an impolitic royalty from the miner, was made in the attempt to lease the lead and copper lands on the Mississippi and Lake Superior.—*Lorimier v. Lewis, 1 Morris (Ia.) 253; 12 M. R. 437.*

The government had no occasion to deal with lands containing the royal metals until the acquisition of California, upon which event, instead of adopting any system of legislation, it merely preserved the mineral lands from sale and acquiesced in the asserted rights of the prospector and miner until 1866.

In that year were passed the first of what are known as the Mining Acts, now embraced in Title 32 of the Revised Statutes. This was followed by the Acts of 1870 and 1872, with other slight amendments.

The ultimate intent of these Acts is to pass the fee simple to the discoverer of a mine, or his grantees, after a certain amount of development has been made upon the claim and until final entry the locator holds by a possessory title.

Progression of Title.

Title becomes initiate by discovery; the possessory title is complete upon location and record, and is maintained from year to year by compliance with the condition of annual labor. The occupant after $500 expenditure has the right to buy the land from the United States by entry thereof in the local land office. This entry entitles him to receive a patent which issues later from the general land office at Washington.

Title After Entry and Before Patent.

After entry in the land office, although the title is still technically equitable, it amounts practically to the legal or fee simple, because:

First—The receiver's receipt for the purchase money is evidence of title in the purchaser, with or without statute to such effect.—*Last Chance Co. v. Tyler Co. 61 F. 558.*

Second—The subsequent issue of the patent follows as a mere ministerial act, except where some irregularity has occurred in the application, or a protest delays or prevents issue.

Third—Before entry is allowed the time for the assertion of any adverse title must have elapsed.

Fourth—Upon the issuance of patent, the fee passes to the purchaser, and the title relates back in all cases to the entry at least.

Choice of Land Systems.

It was in the power of the United States to have adopted any one of several different systems in the disposition of its mineral lands; but at some stage, under any system, a decision of the conflicting equities between the adverse claimants would have to be reached.

First—A system based on rectangular surveys, upon which a block book could be platted, which would, on its face, establish the priority of any assertion of title to the block representing any certain mining claim, the same as adopted in the disposition of agricultural lands by quarter-sections.

Second—A system under which every applicant would receive a patent upon an *ex parte* proceeding without regard to priority or adverse rights, leaving the several patentees to contest their equities in the courts upon an equal footing analogous to the old land system of Virginia.

Third—A system based on making the proceeding to obtain patent a proceeding *in rem*, compelling the applicant to give notice of his application and forcing an adjudication of all adverse titles before the issue of the patent, which was the Pennsylvania system.

The last is the system adopted by the government, by the original act of 1866, and continued in all the amendments.

Priorities Adjudicated Before Patent Issues.

The result follows that upon the issue of a patent the patentee has got rid of all assertions of title hostile to his own title, and all supposed prior discoveries and locations which might have interfered with him are lost, by failure to assert them as adverse claims, or to prove them in the ejectment suit brought in support of the adverse claim.—*Silver Bow Co. v. Clarke, 5 P. 570; Raunheim v. Dahl, 9 P. 892; Kannaugh v. Quartette Co. 27 P. 245; Seymour v. Fisher, 16 Colo. 197.*

The publication required by the Mining Acts "is in effect a summons to all persons whose interests may be affected by the issuance of a patent," to appear and file their adverse claims.—*Wolfley v. Lebanon Co. 4 Colo. 112; 13 M. R. 282; Wight v. Dubois, 21 F. 693.*

The Land Department Issues the First Patent to the first applicant, without regard to the priority of his possessory title, and in case the senior possessory title fail to assert its seniority by filing and prosecuting its adverse claim, the seniority of such possessory title is lost, and yields to the title which the government issues to the applicant for patent.

Segregation from Public Domain.

The Surveyor General shows all conflicts with previous surveys, upon the approved plat; and notes all previous official surveys in the approved field notes; but only approves as to the correctness of the survey, not excluding the area of priorities, if their inclusion is asked. The register of the land office, when application for patent is made, is supposed to except all previous surveys as noted in the approved field notes (where such surveys have been followed by applications for patent), in his notice for publication, which is the first period at which the officers of the United States recognize the segregation of the claim from the mass of the public domain. From this point the claim so first segregated must, under the practice of the land office, be recognized by all subsequent applicants for survey as prior in point of time, and they are compelled to except from their applications such previously approved surveys, so duly followed by filing their applications.

Under former practice the segregation took place in the office of the Surveyor General. But the Surveyor General now approves everything within the exterior boundaries as clear ground, to the applicant for survey, if he so request, leaving to the land office the duty of excepting from his entry and patent, prior patents and applications for patent.

Under the Act of 1866 the survey was not approved until after the application had been otherwise perfected.

The Doctrine of Relation.

Where successive steps are essential to perfect title, as discovery, location, record, application for patent, entry and finally patent; and during the progress of the time required to complete the series two hostile parties have taken some or all of these steps towards obtaining title to the same ground—the doctrine of relation may become material to determine between them the question of priority.

When discovery is followed by location and record within the proper or fixed periods allowed and entry and patent follow in due course, the title is considered in general and in theory to relate back to discovery. This theoretical relation is, of course, of no materiality unless a second title has intervened, and if a second title has intervened at a period when the first title was in default the doctrine of relation does not apply, or rather it favors the second title.

A patent always relates back to date of entry at least. But a senior entry on a junior application will not be prior to the entry of a senior application when made, because relation will carry the junior entry back to the date of its senior application. All three items, the application, the entry and the patent are merely successive steps, and the latter two relate to the date of the first.

Many loose assertions are found in the cases on this topic of relation, not taking into consideration the conditions above attempted to be pointed out. If, in all cases, a patent related back to discovery, a patent of to-day on a location of 1866 would supplant a patent to the same ground issued twenty years ago. Relation never applies either to defeat a statute or to work manifest injustice.

In *Hickey v. Anaconda Co. 81 P. 810*, the Montana Supreme Court refused to allow the law of relation to carry the title of the Nipper lode patent

back to the date of its location certificate, a paper so defective as to be void.

The different classes of claims to which it applies necessitate certain distinctions.

Where Both Are Possessory the first discovery followed up by completed location within the allowed period becomes a title calling back to date of discovery, and by the doctrine of relation will cut out a possessory title completed sooner though initiated later than the first discovery.—*Patterson v. Hitchcock, 3 Colo. 532; 5 M. R. 542.* For instance, if A discover a lode on January 1st in a State which gives 60 days to sink discovery and 30 days more to record, and he completes sinking on the 60th day and records on the 90th day, he has an older and better title than B, who discovers the same vein on January 10th, but promptly completes his sinking by the 20th and surveys and records on the 21st. B is prior to A in point of time on every incident of location except discovery, but A, not exceeding his statutory limit of time, is not in default on any item of location, clearly calls back to January 1st and has the older and better possessory title.

If, on the other hand, A allows any of his periods to expire without doing the act for which the law allowed a certain time and the second title becomes initiate during such period of lapse, the doctrine of relation does not apply and B has the older and better title.

Patented Claims—Failure to Adverse.

Where two claims overlap or cover the same ground, and one of them applies for patent, the other must adverse and maintain its adverse, otherwise it loses all pretense to priority; and if it fails so to do and afterwards goes to patent on its own application. all claims to priority are gone and it cannot appeal to the doctrine of relation to defeat the express terms of the statute.—*Eureka Co. v. Richmond Co. 4 Sawy. 302; 9 M. R. 578.*

The above paragraph refers only to cases where there is a surface conflict. For if there be no surface conflict there can be no adverse and the rule has no application.—*Empire Co. v. Bunker Hill Co. 114 F. 420.*

Thus, in the class of cases where two veins parallel on surface, dip toward each other and are found to unite going down, the doctrine of relation has its full application and title will be carried back to the date of location and if necessary to the date of discovery so as to give the united vein to the title first initiated and perfected without default or lapse.

Applications Pending at Same Time.

The question may also arise between two claimants who are applying for patent at the same time.

This proceeding begins by an order for Survey, which is followed by the survey in the field and by its approval in the Surveyor General's Office. This approved Survey or the date of its approval determines no priorities. It is only when the papers reach the Land Office that a survey becomes "prior" by its right to be excluded from later applications, and the applicant whose area is excluded in the Land Office becomes the party who must adverse in order to maintain such priority of title as he may claim.—*26 L. D. 81; 29 Id. 226.* If he fail to adverse, his patent when obtained will show the ground excluded in favor of the party who was first to file his "application for patent" (form M. *p. 433*), and even if he be the first to enter and pay and obtain the Receiver's Receipt, the entry when made of the Survey which first filed its "application" will relate back to the date of such filing.

Double Patent Under Different Systems.

It may become material, also, in any case where two parties hold patents for the same ground, which have been obtained under different *ex parte* proceedings where there was no opportunity to adverse and the proceeding therefore not a proceeding *in rem* as

in a conflict between School Land and a mining claim.—*Heydenfeldt v. Daney Co. 93 U. S. 634; 13 M. R. 204.* Or between a lode and a Town Site.—*Talbott v. King, 9 P. 434; Silver Bow Co. v. Clark, 5 Mont. 378; The Smoke House Lode, 12 P. 858.* Or where the same ground has been patented to one as a lode, to another as a placer.—*Iron S. Co. v. Campbell, 135 U. S. 286; 16 M. R. 218.*

Excluded Area.

It is the practice of the department to exclude from each later patent all claims which have land office priority and the junior patentee has no right under his patent to follow any vein on its strike through the area reserved in favor of such excluded survey.—*Montana Co. v. Boston Co. 51 P. 159.* And where such exclusion plainly appears, and, adhering strictly to the ruling in the case just cited, it can hardly be said that there are two grants of the same thing, although each lode patent is issued on the theory that it covers so many lineal feet on the vein.

Where a conflicting area has been allowed to go to a senior patent it does not make that patent senior except as to the overlap.—*U. S. M. Co. v. Lawson, 134 F. 769.*

The Nature of the Merger of the possessory into the patented title is learnedly discussed in *Black v. Elkhorn Co. 49 F. 549; Affirmed 52 F. 859; 163 U. S. 445.*

What It Conveys.

A patent covers blind lodes within and underneath its lines.—*Calhoun Co. v. Ajax Co. 59 P. 608; Affirmed 182 U. S. 499.* The surface, and the right to follow on the dip veins apexing within its lines.—*Empire Co. v. Bunker Hill Co. 114 F. 420.* The surface although the vein has left the side lines.—*Argonaut Co. v. Turner, 23 Colo. 400.*

Conclusiveness As to Title.

A patent is conclusive in all suits at law (1) when valid on its face and (2) when not issued in opposition to law. In any such case it is a final disposition of the legal title and must be recognized by courts and allowed such effect.—*Boggs v. Merced Co. 14 Cal. 279; 10 M. R. 334.* It is also conclusive as to the bounds or limits of the claim.—*Waterloo Co. v. Doe, 56 F. 685.* Patent is conclusive evidence that there had been a sufficient location notice.—*Chambers v. Jones, 42 P. 758;* that a valid discovery and location had been made; that the required expenditure showed on the ground and that the patentee is owner of all veins enclosed by his survey.—*Carson City Co. v. North Star Co. 83 F. 658.* It is a conclusive presumption that there is the apex of a vein within the patented ground.—*Gr. Central M. Co. v. Mammoth Co. 83 P. 668.*

It is conclusive evidence of a prior location as to all claims having surface conflicts not excluded from its area.—*Empire Co. v. Bunker Hill Co. 114 F. 420.* And of a valid discovery.—*Calhoun Co. v. Ajax Co. 182 U. S. 499.*

But the case of *Uinta Co. v. Creede Co. 119 F. 164,* makes the distinction that where a hostile claim has had no opportunity to contest the issue of the patent, as for instance, where a lode has been patented across the line of a tunnel before it was cut in the tunnel, the patent is not conclusive evidence of a valid discovery as against the asserted rights of such tunnel.

The facts were these: The lode was located before the tunnel site was located. After both locations the lode was patented. The tunnel owner on reaching the claim, which crossed the line of the tunnel, had no right to cross if in fact a valid location of the lode claim had been made before the tunnel was started.

The tunnel owners claimed that there was in fact no valid discovery on the lode claim before the location of the tunnel site. The lode owners con-

tended that the patent was conclusive evidence that it had a legal discovery at the time claimed in its location certificate; but the appellate court sustained the reasoning of the circuit court of appeals and held in favor of the tunnel site.—*196 U. S. 337.* Followed on like facts in *Uinta Co. v. Ajax Co. 141 F. 563.*

Conclusiveness As to Mineral Character of Land.

See p. 207.

Patent—When Void.

If not valid on its face or if issued in spite of a law which forbade its issuance, it is an inoperative paper, and may be passed upon and excluded in a suit at law,—because it is *void.—Kahn v. Old Telegraph Co. 2 Ut. 174; 11 M. R. 646; St. Louis Co. v. Kemp. 104 U. S. 636; 11 M. R. 673; Garrard v. S. P. Mines, 82 F. 578.* A patent for a lode in excess of legal width has been held void.—*Lakin v. Dolly, 53 F. 333; Lakin v. Roberts, 54 F. 461;* but otherwise as to patent perfecting locations made prior to the Act of 1872.—*Carson City Co. v. North Star Co. supra.*

Patent—When Voidable.

But if only irregular, or obtained by fraud, or issued to the wrong party, it is only *voidable,* and must, until set aside, or a trust declared thereon, be taken as conclusive both at law and in equity.—*Silver Bow Co. v. Clarke, 5 P. 570; Rose v. Richmond Co. 17 Nev. 26.*

A patent is not void as to the excess from the fact that it conveys more than 300 feet from the center of the lode.—*Peabody Co. v Gold Hill Co. 97 F. 657; 111 F. 818.*

The Land Office Can Not Insert Conditions or exceptions not authorized by law, in a patent.—*Deffeback v. Hawke, 115 U. S. 392; Clary v. Hazlett, 7 P. 701; Talbott v. King, 9 P. 434; Silver Bow Co. v. Clarke, 5 P. 570; Davis v. Weibbold, 139 U. S. 527.*

All Presumptions in Its Favor.

When a patent is judicially attacked all presumptions are indulged to its favor. It will be assumed that everything was done which the law required to be done, and mere irregularities, though proved, will not impeach it.—*U. S. v. Marshall Co. 129 U. S. 579; 16 M. R. 205; U. S. v. Iron-Silver Co. 128 U. S. 673; Galbraith v. Shasta Co. 76 P. 901.*

Placer Patented As Lode Claim.

It is no fraud upon the Government that placer ground has been patented as a lode claim at a greater price per acre.—*Peabody Co. v. Gold Hill Co. 111 F. 818.*

Suits by U. S. to Annul Patent.

When obtained by fraud against the United States, as where mineral land has been entered as agricultural, or upon false representations, the false representations being material, the application to set aside being made without too great delay and innocent buyers being to a certain extent protected—it may be set aside at the suit of the United States. This requires action by the Attorney General, who directs the U. S. District Attorney to bring suit in the U. S. Circuit Court.—*Boggs v. Merced Co. 14 Cal. 279; 10 M. R. 334; Mullan v. U. S. 118 U. S. 271; U. S. v. Iron-Silver Co. 128 U. S. 673.*

Such action lies where the patent has issued through fraud, mistake or erroneous views of law by the Land Department.—*U. S. v. Winona Co. 67 F. 948.* See STATUTE OF LIMITATIONS.

A patent will not be set aside for fraud where the property has passed into the hands of a bona fide purchaser without notice.—*Colo. C. & I. Co. v. U. S. 123 U. S. 307; U. S. v. Clark, 138 F. 294.*

Degree of Proof.

In suits to set aside a patent or to declare a trust in favor of another claimant, the proof to overcome the presumptions in favor of the patent must

be clear and convincing.—*U. S. v. King, 83 F. 188; Thallmann v. Thomas, 111 F. 277.*

It will not be reformed in equity to correct a misdescription where the monuments can not be reset with certainty.—*Thallmann v. Thomas, 102 F. 935; Affirmed 111 F. 277.*

Where Issued to the Wrong Party in fraud of the right of the real owner, the suit is not to set the patent aside, but to have it declared that the party to whom it issued holds in trust, and to compel by decree of court a conveyance from him to the party to whom it should have issued.

The Federal Courts have jurisdiction of such cases independent of the citizenship of the parties. —*Cates v. Producers Co. 96 F. 7.*

Such a suit cannot be maintained on mere priority of title, for here an adverse claim should have been filed, but only on the allegation of breach of trust or in like instances.

A party who had at the time of its issue no claim of title to the land patented has no standing to attack it for fraud practiced on the land department. —*Peabody Co. v. Gold Hill Co. 111 F. 817.*

Irrevocable—No Second Patent.

After a patent has issued, the land office has no power to cancel or recall the same nor to issue a second patent for the same land to another party.— *Moore v. Robbins, 96 U. S. 530.*

Wrong Description.

Where, by reason of erroneous survey or other mistake, the patent describes other land than that actually applied for, it may be corrected upon surrender of the patent.—*22 L. D. 101; 28 Id. 307; 29 Id. 160.*

Title by Receiver's Receipt.

After valid entry its holder has a vested estate and the land has ceased to be public domain.—*Rader v. Allen, 41 P. 154.*

Canceling Receiver's Receipt.

But the land office has the power to cancel the receiver's receipt and all preliminary proceedings, and frequently exercises this power in case of irregularities in the application.

Land Office Adjudications.

When the question of priority between patentees has been contested and adjudicated in the land office their findings within their jurisdiction on matters of fact or mixed law and fact, in the absence of fraud or imposition, are accepted by the courts as conclusive.—*Jeffords v. Hine, 11 P. 351; 15 M. R. 575; Aurora Hill Co. v. 85 Co. 34 F. 515; 15 M. R. 581.*

Squatters' Improvements.

A prior occupant of public land who takes no steps to perfect his title and allows it to go to patent to another has no claim either to title or to be reimbursed for his improvements.—*Helstrom v. Rodes, 83 P. 730.*

INTERFERENCE OF CLAIMS.

Veins Uniting on Strike or Dip.

R. S. Sec. 2336.—Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.—*Sec. 14, May 10, 1872.*

Mining Acts Based on Erroneous Presumption As to Facts—Irregularity of Veins.

The cause of the principal question under this heading is the fact that the U. S. Mining Acts concerning lode claims are based on the supposition or theory that a lode is a straight vein whose course

can be readily ascertained and indicated by a straight line or a series of straight lines; and that occasionally such a vein is crossed by another in a similar straight line, merely requiring the right of way to give each claim its proper lode. But in fact a lode is rarely a straight line; it is seldom to be traced without confusion for more than a few hundred feet; and in its course other veins are absorbed into it; and offshoots (not only spurs, but perhaps better developed veins than itself) run from it; and in its extension downward, it invariably dips laterally; and often shows a fork of which both parts approach the surface; and it will divide, and may or may not unite at another point; and it will abut suddenly upon country rock and so be thrown far to one side; and instead of showing distinct lines, mineral veins are as irregular, as disproportioned in length and width, as much intermingled, though on a larger scale, as are the veins in a block of marble.

The theory that each survey covers a distinct vein, or that a survey covers any vein at all, or that its center line follows the apex of the vein, or that its discovery shaft is sunk on a vein, is all bare assumption—these points depend upon developments, and not on diagrams or surface surveys.

Presumption That Survey Covers the Vein.

But upon proof of discovery and location it is inferred that the survey lines include the apex of the vein, and this presumption throws the burden of proof on the party alleging a departure.—*Armstrong v. Lower, 6 Colo. 585; 15 M. R. 458; Wakeman v. Norton, 24 Colo. 192.*

The interference of veins by uniting on the strike, or, more commonly, the interference of claims by the holder of one part of a blind lode developing into another part of the same lode located by another as a separate lode—was of vital importance before the Act of 1872, because surface lines were not marked and each claimant was supposed to follow his vein wherever it ran. But under present law the surface lines and the apex within them in general

define the rights of all parties, with the obvious exception of

First—Cross lodes.

Second—Veins uniting on the dip—which points are considered under the next two headings.

Overlapping Surveys.

The holder of the oldest patent, *i. e.*, in general the patent which has the senior entry, holds all veins which apex within the area of conflict.—*Montana Co. v. Boston Co. 51 P. 159.* The same rule applies in favor of the older title where both are possessory. Where one is patented and the other is possessory the patented claim holds because (1) it may always have been the earlier title, and (2) if not, it has become so by the failure of the overlapper to adverse.—*Empire Co. v. Bunker Hill Co. 114 F. 420.*

Where there are overlapping surveys, the side lines of the senior claim do not become the end lines of the junior claim when the location extends beyond the intersecting claims.—*Cheesman v. Hart, 16 M. R. 263.* Lines may be lawfully extended over, and stakes set upon prior locations so as to secure parallel end lines, or for any other legitimate purpose.—*Del Monte Case, 171 U. S. 55; McElligott v. Krogh. 90 P. 823.*

A subsequent location is entitled to the overlap on any part of a prior location which is not legally held by such prior location.—*McPherson v. Julius, 95 N. W. 428.*

CROSS LODES.

Priority of Title Controls.

R. S. Sec. 2336.—Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. * * * —*Sec. 14, A. C. May 10, 1872.*

The above section being a single section of an entire Act, must, if ambiguous, be compared with all other sections of the same Act which have any bearing on the subject matter. The only other pertinent portion of the Act is that part of section 2322, which says:

"The locators of all mining locations * * * where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically."— * * * *

In the case of lodes located under or before the Act of 1866, a right of way is clearly granted under the two sections about quoted. Those old claims held but a single vein, and the owners of any other vein had a right to work up to the very wall of the crossed vein. Such being the case, the Act of May 10, 1872, merely added the easement of the right to work through the crossed vein; but as to lodes located under the Act of May 10, 1872, the matter is complicated by the fact that all claims under that Act have a width ranging from 50 to 600 feet, and that all veins within such distance have been granted to the owner of the claim as fully as the vein upon which his discovery is sunk.

Title to the Space of Intersection.

The question has been often stated in this form: —"Does the *space of intersection*, mentioned in section 2336, mean the space of the actual crossing of the veins—or the space through which the cross lode runs from side line to side line?" But this question does not reach the merits and is based upon a misunderstanding or a want of due attention to the words of the Act.

If the cross lode have the right of crossing at the point of actual *vein crossing* only, how is it to be worked across the ground between the side line and the space of actual vein intersection? Of what avail would such a right of crossing be to those own-

ing no easement or estate in such intervening ground? It is clear then that to make the Act have a just and sensible meaning, the "space of intersection" refers to the whole distance from side line to side line, and this being conceded, the real question remains: "To whom does the cross vein *belong*, throughout the space of intersection from side line to side line?"

Sec. 2322 had already granted it to the prior owner of the crossed lode. It was within the power of Congress, by a subsequent clause, to have made the crossing lode an exception carved out of the general grant of the words of the previous section; but has it attempted so to do? The only grant of section 2336 is, the *right of way*, which of itself implies that it was *not* a grant of the vein, but of an *easement* to which the estate of the prior location is made servient.

To give any part of the space of intersection to the holder of the later location would be to take from the older location something already granted to it. To create an exception out of his grant as he originally takes it under the Act of Congress would require in the wording of the Act expressions as strong as are required to create an exception in a deed. An exception is equivalent to the reconveyance of land already conveyed. A right of way is not an exception, but a reservation which may be inferred from any wording indicating an intention to create an easement. It takes nothing from the body of the grant of the first locator; but compels the first locator to use or hold his grant or claim subject to a right or privilege to the junior or overlapping claimant, of reaching the other end of his claim by passage through the senior location.

It seems to the author, from the above reasoning, that a cross lode takes no estate in the claim it crosses and has no rights as against the crossed claim except the mere right to drift through, leaving all ore as the property of the crossed claim.

Decisions As to Rights of Cross Lodes.

All recent cases are in agreement with these views.—*Pardee v. Murray, 4 Mont. 234; 15 M. R. 515; Watervale Co. v. Leach, 33 P. 418; Wilhelm v. Sylvester, 35 P. 997; Calhoun Co. v. Ajax Co. 59 P. 607;* the latter overrules the case of *Branagan v. Dulaney, 8 Colo. 408,* which had been so often cited against the above construction. The *Ajax case* was affirmed in *182 U. S. 499.*

Cross Surveys—Veins Merging.

The fact that the surveys cross does not necessarily raise the question of cross lodes. There must be an actual crossing of the veins, and if one vein unite with the other on the strike the vein beyond the point of union belongs to the holder of the older patent.—*Lee v. Stahl, 13 Colo. 174; 16 M. R. 152; Book v. Justice Co. 58 F. 106; 17 M. R. 617.*

There must be two separate mineral veins to make a crossing within the law.—*Morgenson v. Middlesex Co. 11 Colo. 176; Omar v. Soper, Id. 389.*

The Burden of Proof is on the party alleging a crossing.—*Lee v. Stahl, supra.*

No Right to Enter to Prove Crossing.

The actual crossing of lodes is more often a matter of conjecture than proof, and upon the conjecture of a crossing a party has no right to enter upon the crossed claim to prospect for his lode or prove the crossing. The latter clause of § 2322 contains a proviso against the use of the surface in any such case. The right of crossing can be exercised only by following the vein from some point outside of the crossed claim to a point where it enters the crossed claim, and thence by drift along the same.—*Atkins v. Hendree, 1 Ida. 107; 2 M. R. 328.*

Settlements Between Cross Lode Owners will be upheld, although they were at the time ignorant of their strict legal rights.—*Coffee v. Emigh, 15 Colo. 184.*

As Between Grantor and Grantee the grantor can not claim any implied right to cross the granted ground on pretense of following a cross vein. He has conveyed all veins apexing within the granted area.—*Stinchfield v. Gillis, 40 P. 98.*

VEINS UNITING ON THE DIP.

Prior Location Takes Title.

R. S. Sec. 2336.— * * * Where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.—*Sec. 14, May 10, 1872.*

The above paragraph follows that part of § 2336, which says that "priority of title shall govern" in case of interference of veins on their strike.

It often happens that on developing two veins by shafts from surface they are found to unite as they go down. A vertical section of the two lodes in such case gives the form of the letter Y. Where both claims are possessory, the older title, *i. e.*, the older discovery properly followed by location and record takes the vein below the point of union. If both are patented, or if only one is patented, the obvious question is: Does the first patent hold on account of failure of the first discovery to adverse? or does the first discovery hold?

In the case of the *Champion Co. v. Cons. Wyoming Co. 75 Cal. 78; 16 M. R. 145*, the two lodes in controversy so came together at about 500 feet in depth. The Wyoming lode was patented in 1874. The Philip lode claimed to be a location prior in date to the Wyoming, but was not able to prove such allegation, and therefore had no state of facts upon which the court could properly decide this point and interpret the statute. Still, they intimated that the older possessory title would hold without regard to patent. In the case of *Lee v. Stahl, 13 Colo. 174; 16 M. R. 152*, which involved the rights of cross lodes

only, the court in argument leaned to the same construction.

But the point has been since expressly decided and always to the same result, to wit: in favor of the older location.—*Little Josephine Co. v. Fullerton, 58 F. 521; 17 M. R. 664; Cons. Wyoming Co. v. Champion Co. 63 F. 540.*

Where two veins apexing in two patents were alleged to unite after they had come by the dip under a third patent it was held that the third patent had no title to the vein and that the controversy must arise between the patents which covered the apexes.—*Roxanna Co. v. Cone, 100 F. 168.*

Relation—Presumption.

Even if suspected, such union would rarely be provable in time to support an adverse claim, and even if known an adverse claim could not be brought because an adverse is allowed only where there is a surface conflict.—*6 L. D. 320.* The doctrine of relation back to discovery, therefore, applies, but the date of discovery and of the respective acts of location are open to parol proof. If the union becomes known or comes in contest, as it generally does after both lodes are patented, there exists a presumption in favor of each that it had a valid discovery and location at the date of entry, but there is no conclusive presumption that the date of discovery or of location claimed by the recorded location certificate upon which the patent issued is the true date.—*St. Louis Co. v. Kemp, 104 U. S. 636; 11 M. R. 673; 2 Lind. § 730, 783; Last Chance Co. v. Tyler Co. 61 F. 557.* Conclusive presumptions binding on all parties are fixed only where the party to be bound has had opportunity to have his day in court.—*Uinta Co. v. Creede Co. 119 F. 164.*

SIDE VEINS WITHIN LOCATION LINES BEFORE MAY 10, 1872.

Congressional Bounty or Confirmation.

R. S. Sec. 2328.—Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.—*Sec. 9, May 10, 1872.*

Limited to Single Vein.

Under the original Congressional Act of 1866, no vein except the first claimed was covered by the location or conveyed by the patent.

A lode claim, therefore, located before May 10, 1872, originally covered but one vein, and a patent issued before that date covered but one vein.—*Blake v. Butte Co. 2 Ut. 54; 9 M. R. 503; Eclipse Co. v. Spring, 59 Cal. 304.*

Side Veins Donated to Old Claims Since 1872.

By the A. C. of 1872, which gave to all new locations and future patents the benefit of everything between their side lines, it was added that all old locations and all patents under the old Act should have the same benefit, always saving any rights which had intervened before the passage of the Act of 1872.—*R. S. § 2328.*

The result of this Act is, that a location properly made before May 10, 1872, or a patent issued before that date, covers all side and other interfering veins practically to the same extent, and as fully as locations and patents under the present law; always saving the exception in the section last above cited.—*Pardee v. Murray, 4 Mont. 234; 15 M. R. 515; Walrath v. Champion Co. 63 F. 552.*

SIDE VEINS WITHIN LOCATION LINES SINCE MAY 10, 1872.

All Veins Apexing Within the Lines.

R. S. Sec. 2322.—The locators of all mining locations heretofore made or which shall hereafter be made, * * * where no adverse claim exists * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, * * * —*Sec. 3, May 10, 1872.*

Surface Lines and Apex Define the Claim.

Under the law, as it has existed since May 10, 1872, it is clear that all veins whose tops or apices are within the lines of the claim go with the lode which gives the name to the claim; and the surface lines, rather than identity of the veins, are made to control the extent of the claim, and to fix the boundaries between adverse parties.—*Book v. Justice Co. 58 F. 109; 17 M. R. 617; Doe v. Waterloo Co. 54 F. 935.*

The possible exceptions to this general assertion are:

1. In regard to what are commonly called cross lodes; *p. 150.*

2. Where the outcrops of two apparent veins appear on two separate lines at the surface, but in their downward course such veins dip into each other, unite and form a single vein; *p. 154.*

3. Instances where a location on the dip may have cut off the right of a later appropriator on the apex to follow beyond his side lines extended vertically downward; *p. 175.*

4. Locations and patents before May 10, 1872, where adverse rights had intervened so as to prevent them from taking the benefit of the grant of side veins under the Act of that date; *p. 156.*

One Set of End Lines for Side Veins.

See *p. 178.*

DEPARTURE OF LODE FROM SIDE LINES.

Statement of the Point.

That the vein, and not the surface, is the material grant of a patent to a mining claim has never been disputed; nor can it be denied that it is the intention both of the purchaser in buying, and the Government in selling, to deal with the mineral deposit, the surface being, in itself, comparatively worthless to either. And if the case lay between the Government and the purchaser alone, this manifest intention might prevent any attempt to confine the party to an erroneous survey, giving him only valueless surface, notwithstanding the material fact that it is the patentee, and not the United States, who has chosen the lines which produce the mischief. —*Patterson v. Hitchcock, 5 M. R. 542; 3 Colo. 533.*

But it is the rights of innocent third parties, holding claims beyond the located or patented side lines, which has rendered this question so important, and which must result in maintaining the consistent construction already given to the Act of Congress, confining every claim to its own lines; though even if it were a matter of indifference, this holding requires no forced construction of the Acts under ordinary rules of interpretation, and had been the constant ruling of the Appellate and Circuit Courts before its confirmation by the Federal Supreme Court.

Uniformity of Rulings on the Point.

This question, however, with singular unanimity has been set at rest by the decisions of many courts. It is now beyond controversy that the moment the apex of a vein leaves either side line of its survey the locator has no further claim thereto, on the strike, beyond such point of departure.—*Wolfley v. Lebanon Co. 4 Colo. 112; 13 M. R. 282; Johnson v. Buell, 4 Colo. 557; 9 M. R. 502; The Flagstaff case, 9 M. R. 607; The Golden Fleece case, 12 Nev. 312; 1 M. R. 120.*

These decisions apply equally to patented and unpatented claims, and have been universally acceded to as the only construction which would give to a mining claim the same certainty of title which belongs to other classes of real estate which are free from the complications of dips and departures.

Facts of the Golden Fleece Case.

The case from Nevada is singularly illustrative of the injustice which would result from a contrary holding.

The Golden Fleece Lode was surveyed and staked in 1874, upon a vein supposed to run northwest and southeast. The location claiming 1,500 feet ran due northwest and southeast, with 600 feet width. Afterwards developments by its workings and on the Leonard Lode, whose discovery was about 800 feet to the southwest, showed that the vein really ran at right angles to its originally supposed course. The Leonard Lode having applied for patent, the Golden Fleece made a second survey at right angles to the first which of course embraced all the workings and croppings on the Leonard, and then filed its adverse claim, based on such relocation. But it was held that the Golden Fleece must be confined to its original location and to that part of the vein within the lines of such original location.

Same Holding on Old 50-Foot Patents.

The patent in the *Wolfley case* was issued under the Act of 1866, so that the decision necessarily applies to all patents; because the argument in favor of following the vein, under the Act of 1866, was much stronger than in the case of patents under the later Act.—*Larned v. Jenkins, 113 F. 634.*

Not Color of Title.

In a later suit, upon the same patent construed in the *Wolfley case*, it was held that where the patent owner had followed his vein outside and had held it adversely for five years, that he had not even such "color of title" as would operate to allow him the

benefit of the statute of limitations.—*Lebanon Co. v. Rogers, 8 Colo. 34.*

Surface Location Beyond Point of Vein Departure.

If the location fail to cover the vein, not only is the vein lost after it leaves the side lines, but that portion of the location which extends beyond the point where it loses the vein, has been decided to be defeasible, if not void, having no discovery vein upon which to base any further claim to either surface or other veins which may lie within its lines.—*Patterson v. Hitchcock, 3 Colo. 533; 5 M. R. 542. See* Plat, *p. 21.*

The reason of this decision is the wording of the Act of Congress (§ 2320) restricting a lode claim to a certain number of feet on "each side of the middle of the vein"—so that if the vein is no longer found within the lines of the claim the locator has no basis upon which to hold any number of feet, beyond the point of departure. Discarding this language of the statute, the case of *Watervale Co. v. Leach, 33 P. 418; 17 M. R. 568,* holds that a lode location need pay no attention to the strike and the only consequence of failure to plant it on the strike is to lose the right to follow on the dip.

The decisions on this point do not apply to patented claims; *Argonaut Co. v. Turner, 48 P. 685; 18 M. R. 556,* and there is an initial presumption or *prima facies* that the survey covers the vein until the contrary is affirmatively proved.—*Armstrong v. Lower, 15 M. R. 631; 6 Colo. 393.*

The reason that a patented claim is valid to its full extent for what it does cover is that the patent is of a "piece of land," with all the surface its lines include; the patent is supposed to have been based on a location made on a vein, with only the statutory width on either side, and if in fact it was otherwise, or if the vein departed before it reached the end line, it is too late after patent for any adverse claimant to set up any such variations to defeat the operation of its grant to the entire surface and to such part of

the vein as it does cover.—*Gleeson v. Martin White Co. 9 M. R. 429; 13 Nev. 442.*

VEIN WIDER THAN PATENT.

In an early case between the Colorado Central and the Equator Lode in the U. S. Court at Denver, each claimed under a 50 foot patent, the vein being admittedly 100 feet wide. The Court held that the older patent, the Equator, could hold only to its side line and could not claim extralateral rights on its dip underneath the Colorado Central Patent. In *Bullion Co. v. Eureka Co. 11 P. 515* (Utah), the majority of the Court took the opposite view.

In *Empire Co. v. Bunker Hill Co. 114 F. 417*, the Court held that where there were two patents, one covering the hanging and the other the foot wall, the prior location had extralateral rights and took the whole vein except, of course, the segment within the vertical lines of the later location. The case of *St. Louis Co. v. Montana Co. 104 F. 664*, which it cites, is to the same effect. These precedents are followed in an able opinion by VAN DEVANTER, C. J. of the Eighth Circuit.. *U. S. M. Co. v. Lawson, 134 F. 769. Affirmed, L. v. U. S. M. Co. 28 S. C. R. 15.*

A discovery shaft may be the valid basis of a location although it fails, being up to the edge of appropriated ground, to cover the whole width of the lode.—*Larkin v. Upton, 144 U. S. 19; 17 P. 732.*

LODES, VEINS AND LEDGES.

Definition of the Terms.

The word "lode" and the word "vein" are used indiscriminately in the Acts of Congress* as well as in the popular language, to signify the same thing.

*See the text of Sec. 2320, p. 15; Sec. 2322, p. 157.

In Bainbridge on Mines, the text, page 2, defines them in the same sentence: "A mineral lode or vein is a flattened mass of metallic or earthy matter, differing materially from the rocks or strata in which it occurs." A note to the same suggests the use of the word "vein" as incorrect, when applied to such deposits as those of anthracite coal. But the note is not justified, for the word "vein" is universally used to include coal, and other flat, non-metallic deposits, while the word "lode" is not so used. This is the principal distinction in the use of the words. The word "lode" is of Cornish origin (*Bullion Co. v. Crœsus Co. 2 Nev. 176)*; "vein" is Latin. In the *Eureka case, 9 M. R. 578, 4 Sawy. 302*, where it is said, every known definition was presented to the Court, the opinion does not intimate any difference in their meaning, but says: "Those Acts give no definition of the term 'lode.' They use it always in connection with the term 'vein.'"

The word "ledge" came into use in California after the discovery of the quartz mines, because they were generally found in the hills above the gulches, and were often identified with protruding outcrop. The word "reef," not used in the Acts, is the popular equivalent for lode or ledge in Australia and South Africa. The word "range" is much used in the lead districts of the Mississippi valley.—*Raisbeck v. Anthony, 41 N. W. 72.*

Connection With Context of the Statute.

The only limitation or qualification in the United States Mining Statutes in connection with the words "veins or lodes" or "veins, lodes and ledges," is the expression "of quartz or other rock in place."

"In Place."

These words have been construed material in cases where the vein has been found eroded or broken up. In *Stevens v. Williams, 1 M. R. 557*, where both the overlying and underlying bodies were solid, the deposit was held to be a lode "in place."

In *Tabor v. Dexter, 9 M. R. 614*, where the location was on ore where the overlying rock had been eroded, the ore body remaining covered only with wash or gravel, it was held that the lode was not in place. A like ruling was made in *Leadville Co. v. Fitzgerald, 4 M. R. 380.* The practical point in these decisions is that where a location is claimed to be upon the apex of a lode, it must be upon such apex at a point where it is in place between the original enclosing rocks to be valid as such an apex location as will give it a right to the dip.

Rock in place is contradistinguished from the soil or *debris.* But the lode is in place, though loose, broken or disintegrated.—*Jones v. Prospect Co. 31 Pac. 642.*

Size and Richness of Deposit Not Material.

In *North Noonday Co. v. Orient Co. 9 M. R. 537*, SAWYER, J., says: "A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place, carrying gold, silver or other valuable mineral deposits named in the statute. It may be very thin and it may be many feet thick, or thin in places—almost, or quite pinched out, in miners' phrase—and in other places widening out into extensive bodies of ore. So, also, in places, it may be quite, or nearly, barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode." Its validity as a thing that may be located does not depend on what it runs. —*Shreve v. Copper Bell Co. 28 P. 315; Stinchfield v. Gillis, 30 P. 839.* Neither walls nor pay ore is essential, but it must show rock distinguishable from the country.—*Burke v. McDonald 33 P. 49.* The fissure must be defined.—*Cons. Wyoming Co. v. Champion Co. 63 F. 540.* On the facts in this case it is too late to call one vein a spur and the other a main vein.—*Carson City Co. v. North Star Co. 73 F. 601.*

There Must be More Than a Trace of Mineral—*U. S. v. Rossi, 133 F. 380;* but an assay of one or more ounces (of silver) will suffice.—*Stevens v. Gill, 1 M. R. 579.*

Whatever a Miner Would Follow with the expectation of finding ore, or similar phrases, have been adopted as the practical test of what is to be considered a lode under the Act of Congress.—*Eureka Co. v. Richmond Co. 9 M. R. 578; 4 Sawy. 302; Harrington v. Chambers, 1 Pac. 362.* Any body or belt of mineralized rock is a lode.—*Book v. Justice Co. 58 F. 106; Shoshone Co. v. Rutter, 87 F. 801.*

Different Degrees of Proof.

In *Fitzgerald v. Clark, 42 Pac. 283,* the distinction is made between the proof sufficient upon which to base a location and the proof required where the continuity of the vein is in question, holding to greater strictness in the latter case. The degree of proof required, and the use of the words "considerable distance" or "considerable interval" in the continuity, in the instructions, is discussed in *Butte Co. v. Societe, 58 Pac. 111.*

What might be sufficient proof on which to maintain a mining location, may not be sufficient to maintain an assertion of extra lateral rights.—*Gr. Cen. Co. v. Mammoth Co. 83 P. 648.*

In Land Office Controversies the value of the mineral deposit is a matter immaterial to the government save in contests between mineral and non-mineral claimants.—*21 L. D. 440.*

Faults and pinches do not affect the legal continuity of the vein.—*Cheesman v. Shreeve, 40 F. 793.* The mineral beyond the fault is a part of the same lode or range.—*Raisbeck v. Anthony, 41 N. W. 72.*

Show of Mineral by Seepage.

While the richness or poverty of the vein or of the seam or stratum of rock followed as a vein, in

determining the question of such rock being vein matter, is not of controlling importance, yet, on practical acquaintance with the subject, it will be seen that such point of relative value cannot be wholly ignored.

Where the opinions say that it may be rich or poor, they refer to the well known fact that true veins, for long distances, are often quite barren. But it does not follow that every seam of rock which will assay is necessarily any vein at all. For there do exist seams which carry a little mineral and yet are not veins within the geological or legal definition. The mineralization in such cases, in some of them at least, is caused by infiltration of ore from a true vein or deposit along some plane of cleavage or along the plane between two formations, or through mere mechanical cracks in the rock, and all their mineral is only precipitated or crystallized seepage from the lode or deposit above. Such bastard veins have just enough resemblance to true veins to be used as a pretext of title against neighboring locations on the legitimate vein. They are generally lacking in walls, continuity and in the normal uniformity of a true vein, and yet may have slips which are practically indistinguishable from walls, and have some discolored matter and particles of ore, just enough to be dangerously similar to what is of value only as it is unlike such things.—*Golden v. Murphy, 75 P. 625; 76 Id. 29.*

The question of vein or no vein in law, is, in such cases, a fact to be determined by the jury under the instructions of the court.—*Iron-Silver Co. v. Mike & Starr Co. 143 U. S. 394; Blue Bird Co. v. Largey, 49 F. 289.*

Mineral Bearing Zone.

A broad formation impregnated everywhere with mineral, but traversed by true fissures within itself, cannot be considered as the lode; the fissures within such zone are the lodes and the zone is the country.—*Mt. Diablo Co. v. Callison, 5 Sawy. 439;*

9 M. R. 616. Ore distributed generally, though unequally, throughout the entire mass of limestone of the mountain does not constitute a continuous lode such as may be followed beyond the lines of its location.—*Hyman v. Wheeler, 29 F. 347; 15 M. R. 519.* A belt of porphyry containing mineralized seams is a lode.—*Book v. Justice Co. 58 F. 106; Shoshone Co. v. Rutter, 87 F. 801.* When a larger deposit is separated into two distinct seams with separate walls, each seam is a separate lode.—*Doe v. Waterloo Co. 54 F. 935; Hayes v. Lavagnino, 53 P. 1029.*

Where the mineralization of the alleged lode is not appreciably greater than the surrounding rock it does not constitute a vein. The absence of walls and want of continuity commented on.—*Grand Central M. Co. v. Mammoth M. Co., 83 P. 648.*

Ore in Pockets, Vugs or other irregular and disconnected occurrences without vein matter between does not make a lode.—*Cheesman v. Shreeve, 40 F. 787.* Nor ore bodies formed outside the fissure.—*Tombstone Co. v. Way Up Co. 1 Ariz. 426.*

Where the Continuity of the Ore Body Is Broken by the contact becoming barren for a considerable distance, the legal extent of the vein ceases.—*Stevens v. Williams, 1 M. R. 557; Leadville Co. v. Fitzgerald, 4 M. R. 380.* A vein need not be a straight line nor uniform in dip, thickness or richness of ore. The enclosing cleft or fissure may narrow or even close for a few feet and be found further on. Its continuity may be proved by following either the ore or the rock which carries the ore. Slight proof of ore is sufficient where the enclosing boundaries are distinct; there need be no proof of such boundaries if the ore itself can be followed. But if the vein disappear so far or so completely that it cannot be recognized when it is again found or alleged to be found, there is no sufficient proof of continuity.—*Iron Silver M. Co. v. Cheesman, 116 U. S. 530;* followed substan-

tially in *Hyman v. Wheeler, supra*, and in the *Cheesman case, 40 F. 787.* Where the lode has no definite walls the ore bodies are the guides to follow.—*Bunker Hill Co. v. Empire Co. 134 F. 268.*

All Deposits "in Place" Are Lodes.

The uniform ruling has been that all forms of metallic mineral or mineral gangue in place, whether fissure or contact veins, or impregnations, or other irregular deposits, should be construed to come within the expression "veins or lodes" used in the Act of Congress, and as such to be subject to location and patent under the Act.—*Hayes v. Lavagnino, 53 P. 1029.* There has been in fact a concession that such should be the holding rather than a contention to the contrary. The substantial and contested point has been whether a location or patent on certain forms of deposit was entitled by virtue of including the apex or so-called apex of the vein or deposit, to follow the vein or deposit beyond the side lines underneath the adjoining ground or claims of other parties. This point will be considered under the next heading, APEX.

Evidence of what has been followed up and located on in the same mining locality is admissible as to what is sufficient lode discovery.—*Ambergris M. Co. v. Day (Ida.), 85 P. 109.*

APEX.

The Grant of the Apex Right.

R. S. Sec. 2322.—The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations.

Limitation to Planes of Projected End Lines.

But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.—*Sec. 3, May 10, 1872.*

The mining Act of 1866 which was the first provision for advancing possessory claims to patent provided that the applicant should be granted "such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

The Act of 1872 made a material change by providing that the end lines of every lode claim should be parallel and that these end lines protracted should become bounding planes between which the proprietor of the apex should have the right to follow his vein.

The theory of the Act was that a survey would enclose a vein along its center line from end to end and that the end lines would be at right angles to the strike of the vein. But there are few locations where the miner is so fortunate as to place his stakes so as to comply with such theory. The course of the lode when located or when surveyed for patent is generally a matter more or less of conjecture and even if known, the vicinity of prior claims may interfere with the desired survey and there being no requirement that the side and end lines must be at right angles it is found in practice that many difficult points arise upon most of which by this time there is a satisfactory judicial conclusion.

The common law grant of lands conveys the surface and whatever minerals underlie the surface within lines drawn perpendicularly downward toward the center of the earth.

The apex clause in the act modifies the common law by enlargement to the extent that the claimant

owns and may follow any lode whose apex he covers, beyond his side lines under land adjoining. On the other hand he is not the owner of lodes found within his lines extended downward vertically where such lodes have their apexes outside of his surveyed lines.—*Roxanna Co. v. Cone, 100 F. 168.*

Besides the right to follow his own vein on the dip, he is, under the common law grant of the patent, owner of the soil and rock within his lines carried vertically downward.

This common law grant gives him the ownership of any deposit of mineral belonging to a class which has no apex and also of any lode which though it have an apex, such apex is not located upon or is surveyed in such form as to give no extra-lateral rights to the proprietor of such exterior location.

The above general proposition must be understood with reference to certain limitations and conditions as follows:

The Lode Must Have An Apex.

The outcrop or edge of a vein or deposit is not necessarily its apex. The typical or true fissure vein is a narrow zone of ore-bearing rock descending indefinitely in depth. It is essentially a perpendicular formation, though always, or nearly always, inclining some degrees from true; this inclination is called its dip. The bounding planes of such vein are called its walls. The outcrop or nearest approach of such a vein to the surface is, and always has been, properly styled its apex. Such were the veins generally known and worked on the Pacific slope at the time of the passage of the Mining Acts.

To give such veins the right to their dip was essential to their full use and enjoyment.

Other classes of veins are essentially horizontal in their formation. If found to approach the perpendicular such fact is accidental, not incidental—occasional and rare, not usual or normal. They may be, like coal, a layer of rock itself constituting a

separate geological stratum; or they may be a filling between the planes of contact of two dissimilar formations; or they may be impregnations diffused irregularly through a broad zone. Such deposits are called beds or even fields, terms obviously inapplicable to perpendicular deposits. Their upper boundary rock is commonly and properly called the roof—rarely the wall; and while they may have an outcrop, such outcrop was never known among miners as an "apex" until the use of such term in the Mining Acts induced the attempt to abuse the term by imposing it upon the outcrop of horizontal formations.

The term itself means the top or highest point, and has no significance when applied to horizontal deposits.

Blanket Veins.

In the case of *Duggan v. Davey, 26 N. W. 901* (Dakota), where an eight-degree vein having its outcrop on the side of a hill was claimed throughout its entire extent by those who had their location upon the outcrop, the court ruled that such lode had no apex and that a location on the dip, although made after a location on the outcrop, was valid, and that the outcrop claim could not follow beyond its side lines.

The case of *Gilpin v. Sierra Nevada Co. 23 P. 547*, also intimates that blanket veins cannot claim to have an apex under the Mining Acts. The inclines on the deposit in that instance as worked ran from the surface up, instead of down.

In the Leadville and Aspen cases arising upon veins of the character last above described, in the United States Circuit Court at Denver, any such distinction as above made has not been recognized. But the strict ruling on other points, that there should have been no prior location on the dip; that the apex location must be made on a vein in place, and the necessity of having the apex parallel to the side, and not parallel to the end lines, which is a practical

impossibility when the real deposit is a deeply imbedded field, bed or basin, with a more or less circular rim, have circumscribed and practically defeated most attempts to follow such veins on their dip.

The strength of this position is increased by an attempt to apply the apex law to such deposits as the lead and zinc beds at Joplin, Missouri. There the country for miles is underlaid by a stratum carrying zinc and lead ore. The miner starts a shaft in the open prairie, without any indications whatever, of mineral, and at a certain depth confidently expects to pierce this ore-bearing stratum which is substantially a flat underlying deposit, the outcrop of which may be miles distant—if it have any outcrop at all it is only when some bluff or ravine would expose the edge of the bed at the surface. As to such deposits it is obvious that there is no such thing as locating a claim so many feet on each side of the center of the vein, for, as the Department holds: "The apex of the lode is coextensive with the side lines."—*29 L. D. 689.* In *Iron S. Co. v. M. & S. Co. 143 U. S. 394*, the opinion refers to this distinction and recognizes the validity of such blanket lode locations, treating this incident of no apex proper as an item of minor importance. Blanket veins must be located as lode claims and not as placers.—*Iron S. Co. v. Campbell, 17 Colo. 274.*

The End Lines Must be Parallel.

When we claim the right to follow a vein on its dip as it leaves its side lines and plunges into the earth it is obvious that we are at once dealing with a third dimension rarely referred to in surface grants. It is also obvious that unless this third dimension is guided by parallel planes the claim will, if the end lines diverge, extend indefinitely as it goes down. If they converge, it would, like a wedge, diminish to a line. The statute therefore in terms requires end lines to be parallel and that requirement has no reasonable meaning except as taken in connection with the right to follow the lode on the dip. If, therefore, the locator fail or neglect to

make his end lines parallel he is in disobedience of the terms of the Act, by either fault or misfortune, and has no right to this statutory donation. It was so ruled in *Montana Co. v. Clark, 16 M. R. 80*, where the claim was surveyed as a triangle which could not geometrically have two parallel lines. The same in the *Elgin case, 15 M. R. 641*, which had a survey in the shape of a horseshoe. In both these cases the reason for the parallelism of end lines is fully stated.

The *Eureka case, 4 Sawy. 302; 9 M. R. 578*, has been cited *(Horswell v. Ruiz, 67 Cal. 111; 15 M. R. 489)* as ruling that the requirement of end lines is directory merely and that no consequences attach to its neglect, but the further details of the opinion (on page 596) much qualify the words to that effect used on page 593. We can see no reason why a survey without parallel end lines should be void for the ground within its lines, nor can we conceive that it should be allowed extralateral rights if it do not have end lines substantially parallel. But the case of *Doe v. Sanger, 23 P. 365*, decides in terms that the end lines need not be parallel and that they do not affect the right to follow the lode on the dip for the weakest of all reasons in statutory construction, to wit: because the requirement of parallelism and the grant of the dip are contained in two different sections of the Mining Act.

It is evident from the language used and the plats in *Walrath v. Champion Co. 171 U. S. 294*, in the *Stone Lode case, 118 U. S. 196; 15 M. R. 641*, and other decisions that practically a lode may be surveyed in any shape which a locator chooses to give to his lines.

That there is no requirement that every claim be substantially a parallelogram or must have two endlines and two sidelines. But no such irregular survey has ever been allowed extralateral rights except in the case of *Doe v. Sanger, supra.* Such a location is good for its surface ground and for such parts of veins (not held by location on the apex out-

side) as may be found within its vertical planes.—*Crown Point Co. v. Buck, 97 F. 462.*

Apex rights may be claimed, although the clear ground is a triangle, if the projected end lines are parallel.—*McElligott v. Krogh, 90 P. 823.*

Locations under the Act of 1872 to claim extralateral rights must have parallel end lines.—*Daggett v. Yreka M. Co. 86 P. 974.* The Department has held that end lines must have substantial existence, and that two-tenths of a foot in length is not an end line within the meaning of the statute.—*34 L. D. 470; 35 Id. 22.*

End Lines Under Act of 1866.

It has been constantly held that patents perfecting locations older than the Act of May 10, 1872, may have extralateral rights without the necessity of parallel end lines, and where the end lines converge they may be protracted. *Carson City Co. v. North Star Co. 73 Fed. 597; Central Co. v. E. Central Co. 79 Pac. 834. (Affd. E. C. Co. v. C. E. Co. 204 U. S. 266.)* In *Argonaut Co. v. Kennedy Co. 21 M. R. 163; 63 Pac. 148,* where the end lines diverged the dip right was given at right angles to the strike of the vein. If the Argonaut case is correct and if parallelism of end lines is not required, then we see no reason for drawing the distinction between end lines converging or diverging nor why the former should not enjoy equal dip rights with the latter.

The Lode Crossing Both Side Lines.

In the case of *Flagstaff Co. v. Tarbet, 98 U. S. 463, 9 M. R. 607,* the Supreme Court of the United States at an early date held where the lode crossed from side line to side line at practically a right angle to its survey, that in such case the side lines became end lines, that is to say: They passed down through the lode vertically and cut off all extralateral rights. This decision has been uniformly followed in all cases where the lode has been found to leave its located or patented area through both sides lines.—*King v. Amy-Silversmith Co. 152 U. S. 222; Argen-*

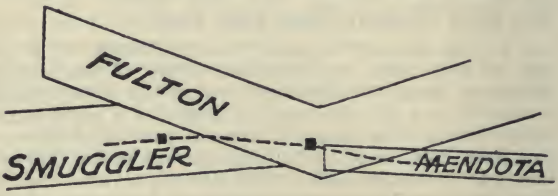
tine Co. v. Terrible Co. 122 U. S. 478; Parrot Co. v. Heinze, 64 Pac. 326; S. Nev. Co. v. Holmes Co. 73 P. 759.

The Lode Leaving One Side Line.

After much greater contention than in the instance of the lode crossing from side line to side line, it has now been repeatedly held that where the lode leaves the claim through one end line and one side line it preserves its extralateral rights, to wit: the right to follow the vein on its dip from the end line to the point on the side line where it leaves the claim. Such end line is protracted vertically downward and produced on its course to form a bounding plane and the other bounding plane is found by protracting and producing another line parallel to the end line plane across the claim at the point where the vein goes out. *Last Chance—Tyler case, 54 F. 284; 61 F. 557; Cons. Wyoming Co. v. Champion Co. 63 F. 540; Del Monte and Last Chance case, 66 F. 212; 171 U. S. 56; Clark v. Fitzgerald, 171 U. S. 92; Carson City Co. v. North Star Co. 73 F. 597.*

Divergence from Same Side Line Twice.

In *Catron v. Old, 48 P. 687; 18 M. R. 569*, the Fulton survey had an angle in the center making it a V shaped claim; crossing the diverging halves the lode left the location twice through the south side line, the diagram of the conflict being as follows:



The Supreme Court of Colorado held that the Fulton Lode had no right to follow the vein upon the dip into any ground beyond its side line carried

down vertically, and the correctness of such ruling could not be seriously disputed under the authority of the *Amy-Silversmith Case.*

Discovery on the Dip.

In *Van Zandt v. Argentine Co. 2 McCr. 159, 4 M. R. 441,* it was held that a prior discovery on the dip would hold against a junior discovery on the apex above. It is also obvious that all tunnel discoveries must necessarily be made on the dip and their validity has never been doubted. *Jones v. Prospect Co. 31 P. 642.* Where the width of the claim is sufficient to allow the apex to be within the side lines all doubt on the point ceases, but where the vein discovered on the dip apexes in foreign ground it is argued that it never becomes the property of the locator; that though he may rightfully plant his discovery shaft on the dip he must so locate as to cover the apex above the point of discovery with his survey.—*Lindley on Mines, § 364.* See *33 L. D. 142.*

The case is stronger for such a discovery after patent, for there then arises a presumption that the patent was based on a valid discovery. If there be a valid discovery the patent should certainly convey the vein upon which such discovery was made; and the equity of the case in favor of such an instance, whether location or patent, is to urge strongly against such close construction as would deprive the discoverer of his asserted rights.

In *Colo. Cent. Co. v. Turck, 50 F. 888, 54 F. 262,* a junior patent was allowed to take the vein on the dip underlying a patent whose discovery shaft was on the same vein, but the vein of which was assumed to leave the side lines on its strike, though it dipped back and remained between them carried vertically downward.

The Common Law Grant of the Patent—Veins Cut Within the Lines, Apexing Outside.

The literal grant of a patent issued under the Mining Acts reads as if it conveyed all veins apexing within the lines and excluded all those whose

apexes were outside. And such is its clear meaning where a prior location has covered the apex of such veins found to dip underneath a junior claim. But where in sinking, veins or deposits are found which have either no apex, or an apex not located upon outside, or an apex not located upon at the date of the patent under which such veins or deposits are found, to whom do such veins or deposits belong?

The decisions have with great uniformity held that such new discoveries presumptively belong to the patentee and refuse to give a literal construction to the patent. The case is fully stated and the point ruled in *Doe v. Waterloo Co. 54 F. 935*, following *Duggan v. Davey, 26 N. W. 887; Leadville Co. v. Fitzgerald, 4 M. R. 385.*

In *Montana Co. v. Clark* the ruling was made that such veins apexing outside, but not located outside, remained still the property of the United States.—*16 M. R. 80; 42 F. 626.*

This ruling is theoretically correct and such vein or part of a vein would become the estate of any locator who made a proper location upon such apex outside. But it often happens that all the surface ground has been taken up in such form that while the apex is covered it is covered in such shape as to allow no extralateral rights and where such is the case the portions of the vein in such position belong to the party whose survey includes them within the vertical planes of his side and end lines.—*Parrot Co. v. Heinze, 64 P. 326; State v. District Court, 65 P. 1020.*

In *Roxanna Co. v. Cone, 100 F. 168*, the Court refused to enjoin in favor of the common law right of the complaining lode which confessedly had no apex, the owners of all the claims which might assert apex rights not being defendants to the suit.

Exception of Such Veins in Favor of Proprietor of Other Lodes.

In *Pacific Coast Co. v. Spargo, 16 F. 348, 16 M. R. 75*, and *Amador Co. v. South Spring Co. 36 F.*

668, it was held that the exception of veins apexing outside, in favor of the proprietors of such veins, should be confined to instances where the rights of such proprietors were in existence at the time of the grant to the patentee whose claim was underlaid by such veins. But all the later decisions refuse to recognize this distinction, and treat the exception as one standing for the benefit of future as well as present proprietors.—*Turck case, supra; Cheesman v. Hart, 16 M. R. 263; 42 F. 98.*

An Owner May Amend His Survey, even after patent applied for, to keep his vein within his shortened claim, by making a new end line and dropping that portion into which no vein extends.—*Last Chance Co. v. Tyler Co. 61 F. 557.* And may amend to correct diverging end lines.—*Doe v. Sanger, 23 P. 365.* In both these instances the amendments were allowed after other claims had been located based on the supposed effect of the original error upon the rights of parties to adjoining ground.

The right so to amend is undeniable, but to allow such amendment to operate to divest rights already vested in the underlie is more than questionable. We can see no difference between an estate vested in an extralateral portion of a lode and an estate vested in the surface of the same.

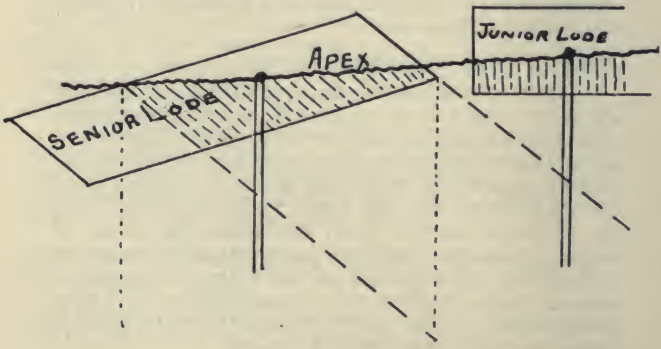
Apex Covered by Several Patents.

Where there are several contiguous patents the dip-right of each must be treated as a separate grant. The two patents cannot be considered together so as to treat them as if they were one patent enclosing the apex of the vein.—*Del Monte Co. v. New York Co. 66 F. 212.* On the other hand in *Carson City Co. v. North Star Co. 73 F. 598*, where the owner of several irregular locations had patented them together they were treated as one claim, enlarging to extreme limits the doctrine of *Smelting Co. vs. Kemp, 104 U. S. 636, 11 M. R. 673*, where the distinction is made between a location and a claim.

There can be but One Set of End Lines, for all the veins covered by the patent. And where departure from one or both side lines renders it material, only the discovery vein can be used to determine what are the planes of the end lines.—*Walrath v. Champion Co. 171 U. S. 293; Cosmopolitan Co. v. Foote, 101 F. 518; St. Louis Co. v. Montana Co. 104 F. 664; Jefferson Co. v. Anchoria Co. 75 P. 1070.* The only decision inconsistent with this ruling seems to be *Ajax Co. v. Hilkey, 72 P. 447*, which allows extralateral rights to a secondary vein apexing within the claim beyond the point at which the discovery vein left the side line.

Relation of End Line to Strike.

The extralateral rights being defined by extending the end lines as parallel vertical planes, it is apparent that unless the end lines are at an exact right angle to the vein, which they rarely are, the grant of the patent is not the grant of the right to follow down on the dip, underneath the same feet of apex enclosed. On the contrary there must be a gain in one direction and a corresponding loss in the other. The following diagram will illustrate this.



The Senior and Junior lodes above are on the same vein, the Senior located obliquely to the apex. The Junior is correctly laid on the strike of the vein. The Senior is the older patent. By the dashed lines the Senior loses the bottom of its own shaft and cuts off the shaft of the Junior lode. The dotted lines and the shafts, of course, are at right angles to the strike of the vein.

Right to the Vein Within the Four Vertical Planes.

Although where the lode crosses from side line to side line it loses its extralateral rights, the claimant has a certain compensation by being allowed to follow on the dip to his end line.

Where a dipping lode crosses from side line to side line, in following it down, it is obvious that two shafts sunk on the vein at the two points where it leaves the side lines will enclose between them all that part of the vein the apex of which is within the patent—Lode Y, Plat X, *p. 183.*

The right to the part of the lode between such two shafts in going down is lost as soon as the vertical plane of the south side line is reached. This is the ground marked B on Plat X. The vein below on B he does not own. On the other hand, he retains all of C, which is the vein within the vertical planes of his side lines and end lines.

A patentee following down on the dip cannot take the vein where he finds it between vertical side and end lines of a prior location whose vein crosses both its side lines.—*Tyler Co. v. Last Chance Co. 71 F. 848; 157 U. S. 684; Argentine Co. v. Terrible Co. 122 U. S. 478.*

The vein may be followed between the planes of its end lines although they are at such angle to the vein as to follow the strike rather than the dip. *Bunker Hill Co. v. Empire State Co. 134 F. 268.* And where a segment is cut out of the lode by the dip rights of another lode the ore beyond the segment belongs to the junior lode. *Id.*

Following Lode Beyond End Line.

In the *Flagstaff Case*, the Federal Supreme Court use this language: "The side lines of the location are really the end lines of the claim." In *Last Chance Co. v. Tyler, 157 U. S. 687*, it says "the side lines of that location become the end lines and the end the side lines." The use of this expression is far from holding that extralateral rights may be pursued beyond the end line. In neither of these cases was the ground actually in controversy beyond the end lines of any of the claims in dispute, so that the expressions quoted are only *dicta* in both instances.

The grant of a patent is of a piece of land with an extralateral grant upon a certain condition, to wit: that its lines enclose the apex of a vein, which vein extends "outside the vertical side lines" of its survey. If its lines enclose such apex from end line to end line or from end line to side line, the condition exists and its extralateral right is established.

In the proposition that where it has a vein going through both side lines it can follow such vein beyond its end line there is no assertion of a condition which, having been fulfilled, some right accrues as the incident to the compliance with the condition.

The statute expressly gives the right to go beyond the side line upon the existence of the condition; it does not give such right to go beyond an end line. Nor is there any known principle of law which would enlarge a grant in derogation of the common law, and therefore to be strictly construed —by allowing the grantee who fails to come within the terms of the condition of his grant to be compensated out of other lands upon the supposition of an implied condition to that effect.

And yet the contrary is strongly contended for (*Lindley*, § *589*), and in the only suit where the point has directly arisen, a case arising on an ore contract made in Arizona and sued on in Connecticut, the holding was made that the vein could be pursued beyond its end line.—*Empire Co. v. Tombstone Co. 100 F. 910; 131 F. 339.*

Also, in *Bunker Hill Co. v. Empire Co. 109 F. 538*, the point was conceded to the same effect, but in that case all the claims involved were surveyed squarely across the strike, so that neither had any status as to the ore in contention unless it was so conceded.

When a lode is recorded it is a publication to the world that a party claims all veins within its lines with the right to follow on the dip between the end lines protracted. It is, as well, a disclaimer of all other rights. The record shows which lines are claimed as side lines and which as end lines. Subsequent to such location so recorded and published the lode is cut on the dip beyond the located end lines by tunnel. The discoverer by tunnel, locates records and by his own exploitation discloses that he is on a vein, which when followed to the surface brings it within the first location whereupon such first location claims the ore by its pretended right to follow the vein beyond its end lines.

We will never concede unless and until compelled by binding authority that by the mere alliteration of language "side lines become end lines," "end lines become side lines," that the first locator can defeat the rights of such tunnel discovery, but hold that he is estopped by his record to claim the right to pass beyond what he, by his own act, has made his end lines.

Recapitulation—Explanation of Plat X.

The plat on *page 183* will illustrate several of the instances above mentioned. It represents a vein covered by a location from end line to end line; another location where the vein crosses from side line to side line, and a third location where the vein crosses one end line and one side line. The dip of the vein is to the south, that is, to the foot of the plat.

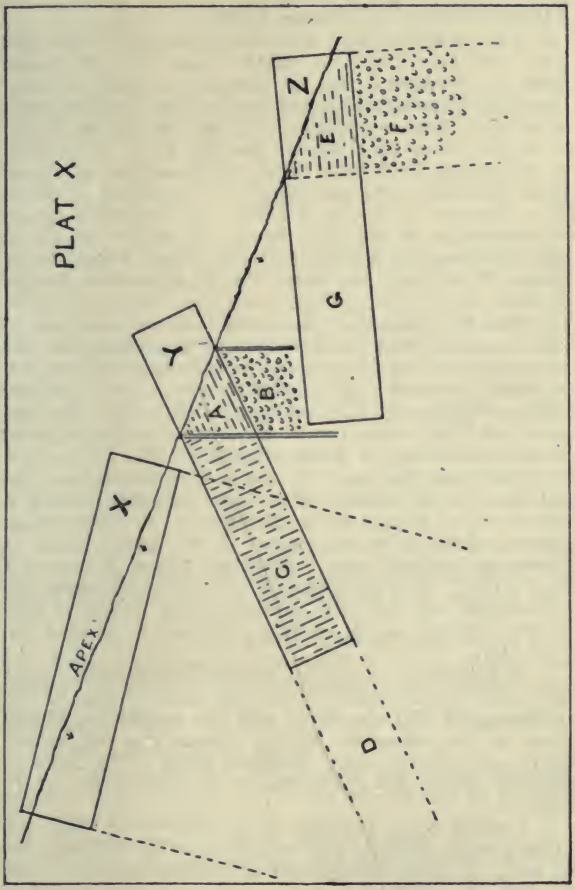
The X location owns, of course, its entire survey and may follow the vein on its dip between

its vertical end lines extended downward indefinitely.

Y owns the vein in the triangle A. He does not own B. On the other hand, he does own C, being that part of the vein between his vertical side and end lines, unless X is the older location, in which case he loses to X the greater part of C.

As to whether Y has any estate in D, being the extension of his vein beyond his end line, is the question discussed on *page 180*.

Z, whose vein leaves one end line and one side line, is the owner of the parcel E, and the parcel F, the vein on the dip, to the extent of his extralateral rights. He can not follow into G. The vein in G becomes the property of whoever may disclose and locate the apex in the vacant ground between Y and Z.


PLAT X
Z
E
F
G
Y
A
B
X
APEX
C
D

Presumption—Burden of Proof.

The presumption, where a miner is found beyond his side lines, is against him. He is *prima facie* a trespasser till he has shown that he gets there by following the lode on its dip from its apex within his lines.—*Cheesman v. Shreeve, 16 M. R. 79; 37 F. 36; Blue Bird Co. v. Murray, 23 P. 1022; Bell v. Skillicorn, 28 P. 768; Cons. Wyoming Co. v. Champion Co. 63 F. 540; Iron S. Co. v. Campbell, 17 Colo. 267; Duggan v. Davey, 4 Dak, 110; Leadville Co. v. Fitzgerald, 4 M. R. 380; Doe v. Waterloo Co. 54 F. 935; Maloney v. King, 64 P. 351; Red Wing Co. v. Clays, 83 P. 841; Gr. Cent. Co. v. Mammoth Co. 83 P. 648.*

But the fact that the owner is claiming extralateral rights does not prevent the application of the presumption that his surface bounds include his vein in such a manner as to entitle him to extralateral rights.—*Wakeman v. Norton, 24 Colo. 192.* But the proof of the continuity of the vein downward must be made.—*Butte Co. v. Societe, 58 P. 111.*

The presumption that the lode extends throughout the claim applies to a lode location within a placer.—*San Miguel Co. v. Bonner, 79 P. 1025.* Such presumption yields of course to the proof when it shows an outside apex. *Montana Co. v. Boston Co. 70 P. 1114.* But the opinion of an expert based on calculation of the dip through long space of unbroken ground is not enough.—*Heinze v. Boston Co. 77 P. 421.*

The issue of a patent raises a presumption that the lode has an apex within its lines.—*Iron S. Co. v. Campbell, 17 Colo. 272.* And the possession of the apex is the possession of the vein to the full extent of the extralateral right.—*Empire State Co. v. Bunker Hill Co. 121 F. 973; Montana Co. v. Boston Co. 71 P. 1005.*

Parties have a right to a trial by a jury on alleged apex rights, and equity has no jurisdiction of such an issue.—*Campbell v. Golden Cycle Co. 141 F. 610.*

It is not essential in trespass for ore taken from the lode on its extralateral dip to allege in terms that the apex of the vein is within plaintiffs boundaries. *Id.*

The degree of proof required of an apex claimant to show continuity is considered in *Daggett v. Yreka M. Co. 86 P. 968.*

DIP.

Dip is a proper mining term and has a plain and important signification. It means the line of departure of a lode from the perpendicular. The number of degrees may of course be calculated from either the perpendicular or from the horizontal, and the usage with professional surveyors is to calculate the degrees from the horizontal, but miners generally speak of a lode as dipping so many degrees from the perpendicular, especially when referring to lodes worked by shafts. It is used along with "angles and variations," in the A. C. 1866, and is with those words omitted in the A. C. 1872, but its place is supplied by the phrase (§ 2322):

> "All veins, * * * throughout their entire depth, * * * although such veins, * * * may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines, of such surface locations."

The term is to so great an extent associated with the terms APEX and DRAINAGE that it has been necessarily to a large extent considered under those heads.

Practical Effect of Dip to Carry the Lode Away from Its Surface Lines.

A lode dipping to the north will gain horizontally to the north about 1.7 feet in 100 feet of descent for each degree from the vertical.

A shaft sunk upon a dipping vein will, in 100 feet depth, measured along the dip, acquire the following vertical depths and horizontal departures

from the top of the shaft for the following angles, all taken from the horizontal:

ANGLE	VERTICAL DEPTH	HORIZONTAL DEPARTURE
10°	17.4 feet	98.5 feet
20°	34.2 "	94.0 "
30°	50.0 "	86.6 "
40°	64.3 "	76.6 "
50°	76.6 "	64.3 "
60°	86.6 "	50.0 "
70°	94.0 "	34.2 "
80°	98.5 "	17.4 "
90°	100.0 "	0.0 "

Cubic Incidents of Lode Claims.

From the outstart it should be kept in view that a lode claim is a solid body of ground and not a "superficies."—*Massot v. Moses, 3 S. C. 168; 8 M. R. 607.* Dip is only one of the incidents of this fact. A placer or even a coal bed furnishes few analogies to define the rights of a claim which leaves the surface at once and follows its own course, governed only by its natural but invisible boundaries.

Estate in the Dipping Lode.

Since the dip may carry a lode under the side lines of an adjoining claim, the right to follow such a lode must indicate either: First—An easement to which the adjoining claim is subject, or, rather, Second—An exception out of the estate of the adjoining claim. The maxim that ownership extends from the surface to the center of the earth in vertical lines, in either event, therefore, does not apply; the claim in its downward course is governed by the dip of the vein whose apex appears at the surface; it extends under the vertical side lines of the adjoining claims on one side, and on the other side it leaves veins pitching under its own side lines as the property of him who is their owner at the surface.—*Iron Silver Co. v. Cheesman, 116 U. S. 530.*

Where a lode cut in a tunnel has a dip it will be assumed that it carries the same dip to the surface.—*Brewster v. Shoemaker, 63 P. 309.*

The Side or Auxiliary Veins, whose apices may be within the side lines of the claim or patent have the same right to the dip as has the principal or discovery vein.—*Jupiter Co. v. Bodie Co. 11 F. 666; 4 M. R. 412; Walrath v. Champion Co. 63 F. 552.*

No Apex—No Dip.

Any located or patented claim which has been so surveyed that its vein runs practically at right angles to the side lines cannot claim the dip beyond its side lines.—*The Flagstaff case, 98 U. S. 463; 9 M. R. 607; McCormick v. Varnes, 2 Ut. 355; 9 M. R. 506; Argentine Co. v. Terrible Co. 122 U. S. 478,* and cases cited under APEX.

Effect of End Lines.

The end lines of all lode claims are required to be parallel; and where the lode in its descent reaches the end lines protracted, the claim ceases and the dip can not be followed across the protraction of the end lines.—*Richmond Co. v. Eureka Co. 103 U. S. 839; 9 M. R. 634; Stone Lode case, 118 U. S. 196; 15 M. R. 641.* To allow the end lines to diverge is to allow the claimant an ever increasing lineal extent of vein as he descends. *Page 171.*

When the Grantor Conveys a claim or part of a claim he conveys the right to follow on the dip all veins apexing within the granted ground.—*Stinchfield v. Gillis, 30 P. 840; 40 Pac. 98; Boston Co. v. Montana Co. 89 F. 529.* This would seem self-evident in a conveyance of the entire claim or of a claim divided across from side line to side line. But in every mining deed the dip right should be mentioned in express terms.

WALLS.

Defined.

In a contact vein the roof or hanging wall is the plane of the contact above; the floor or foot wall is the plane of the contact below. In fissure veins the walls are the plane of demarcation between the country and the gangue.

Relation to the Country.

It should seem almost self-evident that the nature of the wall must depend upon the nature of the country rock and the nature of the material which it encloses. Between certain rocks the plane of separation would be distinct and traceable; between other rocks a diffusion of the oxides and minerals of the enclosed material through the adjoining country, would obliterate more or less all trace of the original plane of division. Where this plane of division is manifest to the eye there is what miners call a wall—where it has become obliterated they say there is no wall. It is therefore manifest that the fact of the absence of one or both walls, is, in itself alone, no proof of the non-existence of a vein, they being a mere accidental circumstance. And it has been so decided in the *Lime Lode case, 116 U. S. 530*, and in the *Durant case, 29 F. 354; 15 M. R. 519*. In the former decision, after defining what constitutes a lode as a "body of mineral or mineral-bearing rock within defined boundaries," MILLER, J. adds: "In the existence of such body and to the extent of it, boundaries are implied." In the latter case, in such language as would be used by a lawyer thoroughly familiar with the subject-matter, HALLETT, J. says: "It is true that a lode must have boundaries, but there seems to be no reason for saying that they must be such as can be seen."

Broken Ground—Slips—Natural Cleavage.

It is also evident that subsequent disturbance of the vein matter would tend to destroy the con-

tinuity of the wall; and in many classes of rock the natural cleavage is such as often to be mistaken for and followed as a wall. In such ground a very little manipulation may be made to show an apparent wall where none, in fact, exists.

Disappearance of Wall.

It is nevertheless true that where a wall has shown itself for some distance and disappears—that is an important item to be considered where the further continuity of the vein is made doubtful by reason of the simultaneous disappearance of the mineral and an apparent change in the rock which is being followed. *See page 41.*

Wall or Side of Working.

It is also to be observed that the term "wall" is often used with reference to the actual *side* of a drift, shaft or other working without reference to its association with the vein, and finding mineral by "cutting through the wall" is spoken of as if it implied no contradiction of terms.

SPURS.

The word spurs is not found in any of the Acts of Congress nor in the patents issued under them. It is a dangerous term, because its meaning is relative, not definite. That which, when first discovered, may be called a spur, may prove to be a better developed vein than the lode from which it strikes off.

But the term found its way into the Colorado Territorial Act of 1866, and is seen in most records; when properly applied it signifies a feeder to, or offshoot from, a lode. As such it is part and parcel of the lode, at least as far as the side lines of the claim, and if it extended much further, it could hardly be called a spur.

A spur is defined (Bainbridge, p. 2, note), as "A lateral branch from the main lead, not returning to it, but losing itself in the surrounding soil."

Though called a spur (which word is apt to be used as a slurring term) it is in law a lode upon which a valid title may be founded if it do in fact show a "well-defined crevice."

Where repeated locations have been made upon a mineral vein it is too late to call it a spur, especially where the law fixes no limit to the size of the vein which may be located, nor admits comparison of different size between conflicting locations.—*Carson City Co. v. North Star Co. 73 F. 601.*

When the discovery or existence of a lode is in contention, its size, strength, continuity and other like incidents are questions of fact to be found by the jury.—*Blue Bird Co. v. Largey, 49 F. 289; Book v. Justice Co. 58 F. 106.*

Ore bodies formed off from the fissure do not form separate veins.—*Tombstone M. Co. v. Way Up Co. 1 Ariz. 426.*

ANGLES AND VARIATIONS.

Use in Statutes and Conveyancing.

In § 4, A. C. 1866, the words "angles and variations" were used, and under the Act a lode was patented with its "angles and variations." They are neither law terms nor technical mining expressions, but are supposed to cover the digressions of a lode from a straight line, and might be extended to "faults." In arguing the important question arising upon patents under the old law when the vein left the side lines, these words were strongly urged as indicating the intention to pass the vein as the essential grant of the patent. These words, or like terms, are in common use in the phraseology of mining deeds (*Bullion v. Crœsus Co. 2 Nev. 168; 5 M. R. 257*) but are not words of essential description.

Irregular Surveys With Unnecessary Angles.

A lode may and should be surveyed to cover all its angles. But acute angles such as were attempted in the *Stone Lode*, leading to fantastic figures, widely different from the parallelogram intended in the Act of Congress, even if they have two parallel courses which they call end lines, run a risk of being ruled out of any right to claim beyond their side lines. In other respects they may be wholly valid if the end lines are regular and the statutory width and length are not exceeded.—*Iron Silver Co. v. Elgin Co. 15 M. R. 641; 118 U. S. 200.*

Whether the presumption allowed in ordinary cases (*Armstrong v. Lower, 6 Colo. 582*) that the survey covers the vein would be indulged to a claim which has acute angles may be doubted. Such presumption is merely to fix the party on whom is the burden of proof, and on an angled claim ought to yield to very slight evidence.

In the case of the *Jack Pot Lode* the Department required an amended survey where, by assuming a zigzag shape, the width of the claim exceeded 600 feet, and also ruled that a long end line parallel to another end line less than 3 inches long could not be considered parallel end lines within the meaning of the law.—*34 L. D. 470.*

Angles to Allow for Slope.

But where the lode has a pitch and is located on rising ground, especially where it crosses the saddle of a mountain or passes through a deep gulch, an angle or angles ought sometimes to be made, the direction of which will depend upon the dip of the lode, whether into or out of the mountain, and the extent of which will depend upon the degree of the dip. Such allowances are not called for where the location is on level ground nor even on rising ground if the lode runs directly up and down hill; but are essential under conditions familiar to surveyors and to experienced prospectors, in order to keep the apex fairly between the side lines. *See page 185.*

DRAINAGE.

Legislative Control.

Sec. 3.—The general assembly may make such regulations, from time to time, as may be necessary for the proper equitable drainage of mines.—*Colo. Const. Art. XVI.*

Under the above authorization R. S. §§ 4226-4234, attempt to regulate this subject. Such State control is also recognized in section 2338 of the U. S. Statutes.

But the subject itself is one of inherent difficulty. The Act seeks to provide that where one mine drains another, the mine thus benefited shall pay its proportion of the cost of drainage. Where a tunnel or lower adit drains another mine, it is doubtful whether such Acts have any application, as such drainage is only incidental.—*Baird v. Williamson, 15 C. B. N. S. 376; 4 M. R. 368; Townsend v. Peasley, 35 Wis. 383; 2 M. R. 612.* But where one mine hoists the water of another a natural equity is more apparent, and statutes in aid of contribution, even giving a royalty to the draining mine, have been enforced.—*Ahren v. Dubuque Co. 5 M. R. 144; 48 Ia. 140.*

Coal Mines.

Where in case of veins or deposits of the class represented by coal beds, one mine lies under the dip of another mine at a higher level, it is under servitude to the water flow of the mine above.—*Philadelphia Co. v. Taylor, 5 M. R. 133; 5 Leg. Gaz. 392.*

Servitude of the Lower.

In lode mines the same rule applies—that the lower workings must stand the water from the higher pits, subject to such regulations as the Drainage Act supplies, where such Act exists and its provisions can be enforced; and the upper mine can not wantonly cast its water on the lower.—*Locust Co. v. Gorrell, 9 Phila. 247; 5 M. R. 129.* The same rule applies to quarries.—*Ulmer v. Farnsworth, 15 Atl. 65.*

A Drainage Contract Between Two Mines having a common water burden was construed and enforced and a heavy judgment for damages sustained, the Court holding that the relation of the mines to the common enemy was such that there was ample consideration for the promise to contribute; that a promise to pay what was proper and fair, the mines being equally benefited, meant a promise to pay one-half of the expense and that the managing agent of the corporation had power to make such a contract. —*Fisk M. Co. v. Reed, 77 P. 241.*

DITCHES AND WATER.

Congressional Recognition of Easements.

R. S. Sec. 2339.—Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.—*Sec. 9, A. C. July 26, 1866.*

Excepted in Patent.

R. S. Sec. 2340.—All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights as may have been acquired under or recognized by the preceding section.—*Sec. 17, A. C. July 9, 1870.*

Claims Subject to Ditches, Flumes and Trails—Parol License.

R. S. Colo. Sec. 4216.—All mining claims now located or which may be hereafter located, shall be subject to the right of way of any ditch or flume for mining purposes, or of any tramway or pack trail, whether now in use or which

may be hereafter laid out across any such location; *Provided, always,* That such right of way shall not be exercised against any location duly made and recorded, and not abandoned prior to the establishment of the ditch, flume, tramway or pack trail, without consent of the owner, except by condemnation, as in case of land taken for public highways. Parol consent to the location of any such easement accompanied by the completion of the same over the claim shall be sufficient without writings; *And Provided further,* That such ditch or flume shall be so constructed that the water from such ditch or flume shall not injure vested rights by flooding or otherwise.—*Feb. 13, 1874.*

Besides the Act of 1866, above printed, Congress allows right of way to ditches, tramways, reservoirs and power lines over the public lands by Act of 1895 and its amendment.—*28 St. L. 635; 29 Id. 120; 30 Id. 404.*

The Right of the Miner to Divert Water from its natural stream, in opposition to the common law, has been not only granted under the above Act of 1866, but the doctrine of appropriation has now become universally conceded in all the mining and arid states of the Pacific and Rocky Mountain slopes.—*Atchison v. Peterson, 1 M. R. 583; 20 Wall. 507; Jennison v. Kirk, 4 M. R. 504; 98 U. S. 453.*

The party who first appropriates the water for mining, irrigation or other beneficial use, obtains the right to use it both as against those who later attempt to tap the stream above, or who need it in the stream below. Neither agricultural nor mining uses have any class priority one over the other. The first in time is the first in right. A homestead or other entry is subject to the rights of a prior appropriation of water.—*South Yuba Co. v. Rosa, 22 P. 222; Tynon v. Despain, 22 Colo. 240.*

A Ditch is an Easement Over the Land which it crosses.—*Quinlan v. Noble, 75 Cal. 250.* A party can not locate a ditch in such a manner as to prevent the practical mining by hydraulic power, or otherwise, of claims which it crosses; nor so as to cut off the water used by the hydraulic. When ditch crosses ditch, the later claimant must adjust the crossings

so as not to interfere with the full use of the prior ditch.—*Jennison v. Kirk, supra.*

Appropriation by Placer Location.

It has been held that a placer location is of itself an appropriation of all the water flowing across it to the extent needed for working it.—*Schwab v. Beam, 86 F. 41.* This is an extreme holding and seems to us an indefensible position.

The Change of Locality where the water is used does not forfeit the right.—*Maeris v. Bicknell, 7 Cal. 262; 1 M. R. 601.* The owner may change either the point of diversion or the place of use.—*Telluride v. Davis, 80 P. 1051; Strickler v. Colo. Springs, 26 P. 314.* If he has prior right to the water he may take it by a new and different ditch.—*Jacob v. Lorenz, 33 P. 120; Greer v. Heiser, 16 Colo. 306.*

Intervening Rights.

But he can not change the point of diversion or the line of his ditch to the injury of those who have in the meantime acquired rights.—*Last Chance Co. v. Bunker Hill Co. 17 M. R. 449; 49 F. 430; Handy Ditch Co. v. Louden Co. 27 Colo. 515; Fuller v. Swan River Co. 16 M. R. 258; 19 P. 836.* The only case which disregards the rights of intervening appropriators seems to be *Davis v. Gale, 4 M. R. 604; 32 Cal. 26.*

A Party May Use the Bed of a Natural Stream as his means of conducting water added to it by a ditch, without being considered as abandoning the water by mingling it with the original waters of the stream.—*Butte Co. v. Vaughn, 11 Colo. 143; 4 M. R. 552; Oppenlander v. Left Hand Co. 18 Colo. 142.*

Location of Ditch Right.

At the point where water is taken from the stream, post notice as follows:

DITCH NOTICE.

MIDLAND DITCH.—I claim 150 inches of the water of this stream, to be taken by ditch from this point to claims

on *Wightman's* Gulch, in *Summit* Mining District, *Rio Grande* County, for mining purposes.

January 17, 1907. ALEXANDER G. COCHRAN.

The posting of this notice where local statutes require no further filings, would, when accompanied by collateral acts showing intention to follow up, give a reasonable time to begin the ditch.—*Dyke v. Caldwell, 18 P. 276.*

The ditch should be staked and work commenced and prosecuted with reasonable diligence. If the notice be not followed up within a reasonable time by actual work in carrying out the intended appropriation, it amounts to absolutely nothing.

Unless required by district rule or statute the existence of a record could not be insisted on as a condition of title, where the ditch is actually constructed and continuously used. But record is customary, always advisable, and when made becomes the initial point in the chain of recorded title.

In Colorado, by Act of 1903, R. S. §3181, duplicate maps and statements are required to be filed with the State Engineer within sixty days after the commencement of actual construction, or the beginning of the survey of the ditch. After approval the State Engineer certifies the duplicate map and statement, returning it to the claimant who must file it within ninety days from the time stated as the date of commencement, with the Recorder of the county in which the headgate is located.

DITCH STATEMENT.

KNOW ALL MEN BY THESE PRESENTS, That I, *Alexander G. Cochran*, of St. Louis, in the State of Missouri, do hereby declare and publish as a legal notice to all the world that I have a valid right to the occupation and possession of that certain tract or parcel of land lying in Summit Mining District, in the County of Rio Grande, State of Colorado, for ditch and mining purposes, and more particularly described in the map hereto attached. That I have located the MIDLAND DITCH, and do hereby make and file, in compliance with the laws of the State of Colorado, this statement in duplicate, and that the accompanying map, which shows the location of said ditch, forms a part of this filing and is hereby made a part thereof.

First. The headgate is located at a point on the south bank of the Alamosa river; from which it derives its supply of water, whence the N. E. corner of Section No. 31, Township 37, Range 4 East of the New Mexico Principal Meridian, bears N. 45° E. 600 feet.

Second. Said ditch is four feet deep, five feet wide at the top and four feet wide at the bottom; the grade is ten feet per 1,000 feet and the length is 2½ miles.

Third. The carrying capacity of said ditch is 150 cubic feet per second of time.

Fourth. Work was commenced on said ditch on the 17th day of January, 1907.

(Claimant may take either date of survey or date of actual construction begun for this paragraph.)

Fifth. The estimated cost of ditch is $3,000.

ALEXANDER G. COCHRAN.

STATE OF COLORADO, County of *Fremont:* ss.

Alexander G. Cochran, being first duly sworn, deposes and says that he is the claimant of the within named ditch and water-right; that he has read the foregoing statement and has examined the accompanying map, and that the same are true to the best of his knowledge and belief.

ALEXANDER G. COCHRAN.

Subscribed and sworn to before me this 1st day of February, A. D. 1907.

George W. Clelland,
Notary Public.

The map accompanying the above statement is required to be on white linen drawing paper, 24 by 36 inches in size, with a two inch margin on the left side, and should show the following:

First. The location of the headgate by course and distance to a corner of the public survey, or if upon unsurveyed land, to some natural object, so that the same may be easily located.

Second. The general course and the name of the stream.

Third. The route of the ditch by course and distance.

Fourth. The legal 40 acre subdivisions and other patented lands.

Fifth. The ownership of all lands crossed by the ditch or canal.

And should also contain the following:

AFFIDAVIT OF SURVEYOR.

STATE OF COLORADO, County of *Fremont:* ss.

E. E. Chase, being duly sworn on oath, deposes and says that he is the engineer (or surveyor) of the MIDLAND

DITCH; that the survey of the same and the map thereof was made by him (or that such map was made under his instructions), and that such survey is accurately represented upon this map; that he has read the statement thereon, and that the same is true of his own knowledge.

E. E. CHASE.
Engineer (or Surveyor).

Subscribed and sworn to before me this 1st day of February, A. D. 1907.

George W. Clelland,
Notary Public.

When it is impracticable to make a complete survey and maps within the sixty day period, temporary maps may be filed with the statements, to be supplemented by a detailed map when the survey is completed.

When local statutes do not require other details or the filing of maps the above statement would be a valid location certificate of ditch rights, by incorporating into the statement a description of the course of the ditch, and omitting reference to the map.

How Conveyed.

Right to water appropriated may be transferred like other property. A ditch is real estate and is conveyed by deed.—*Smith v. O'Hara, 1 M. R. 671; 43 Cal. 371; Bradley v. Harkness, 26 Cal. 69; 11 M. R. 389; Burnham v. Freeman, 11 Colo. 601; R. S. Colo. § 669.*

Appurtenance.

Whether a deed of land conveys the ditches and water rights depends upon the intent of the grantor, and may be implied where the use is necessary to its beneficial enjoyment.—*Arnett v. Linhart, 21 Colo. 188; Gelwicks v. Todd, 24 Colo. 494.* The water right goes with the sale of a mill site.—*N. A. Co. v. Adams, 104 F. 404.* The ditch was held no appurtenance in *Quirk v. Falk, 47 Cal. 453; 2 M. R. 19,* and *Ginocchio v. Amador Co. 67 Cal. 493.*

It has become a rule of property in Montana that "a water right is appurtenant to the land upon

which it is used."—*Leggat v. Carroll, 76 P. 806.* A patent does not divest ditch rights.—*Dodge v. Marden, 7 Or. 456; 1 M. R. 63.* The right granted under the A. C. 1866 was not confined to ditches then in existence.—*Jacob v. Lorenz, 33 P. 119.*

A Ditch May be Abandoned Without Necessarily abandoning the water which it carried.—*New Mercer Co. v. Armstrong, 21 Colo. 357.* Non-user of ditch does not necessarily amount to abandonment.—*Welch v. Garrett, 51 P. 405.*

Buyer Must Take Notice of.

A ditch is a physical and visible monument, and doubtless the grantee of land crossed by a ditch buys with presumptive notice of its existence.—*Oregon Co. v. Trullenger, 3 Or. 1; 4 M. R. 247; Lampman v. Milks, 21 N. Y. 505.*

Relation.

When a ditch is made for the appropriation of water, the right relates back to the commencement of the work on the ditch, if the same be completed within a reasonable time.—*Maeris v. Bicknell, 7 Cal. 262; 1 M. R. 601; Irwin v. Strait, 18 Nev. 436.*

But if the ditch be not completed with due diligence, the right only accrues from the time the water is actually appropriated.—*Ophir Co. v. Carpenter, 4 Nev. 534; 4 M. R. 640.* Facts stated and held to amount to due diligence.—*Oviatt v. Big Four Co. 65 P. 811; Sand Point Co. v. Pan Handle Co. 83 P. 347.* And the ditch has a right of way over claims located across its line after work commenced, but before completion.—*Miocene D. Co. v. Jacobsen, 146 F. 680.*

Until claimant of water is in a position to use the water he cannot claim damages against a party diverting or using it.—*Miles v. Butte Co. (Mont.) 79 P. 549.*

Surplus Water.

Ditch owner must return surplus.—*Stanford v. Felt, 71 Cal. 249.* After user by placer miner it must

be let go to claims below.—*Alder Gulch Co. v. Hayes, 9 P. 581.* Waste water defined.—*Byrne v. Crafts, 73 Cal. 641.*

The flowage of water from a tunnel is a subject for appropriation, and, where a party appropriated water from a tunnel, which was afterwards under cut by a lower tunnel, the water of which it also appropriated, its right, by relation, went back to the original appropriation.—*Ripley v. Park Center Co. 90 P. 75.* But such appropriation does not impose any obligation on the tunnel owner.—*Cardelli v. Comstock Co. 66 P. 950:* the same as to water from the sluice of a placer claim and tapped on the owner's ground by his license.—*Fairplay Co. v. Weston, 67 P. 160.*

But the subsequent appropriator who makes his diversion, under the belief that the water appropriated by the senior appropriator will continue to be used as it was until the time of the subsequent appropriation, acquires a vested right to insist on such conditions.—*Baer Bros. Co. v. Wilson (Colo.), 88 P. 265.*

Water flowing from an abandoned artesian well on the public domain is subject to appropriation.—*Wolfskill v. Smith, 89 P. 1001.*

Parol License to Construct.

Where a ditch is constructed on government land or over the land of persons who give their consent, no condemnation proceedings are necessary; the ditch once constructed becomes a lawful easement; or the consent may be treated as giving title by estoppel.—*Yunker v. Nichols, 8 M. R. 64; 1 Colo. 551.* With or without the aid of this or like decisions it remains clear that a ditch over the public land requires the consent of no person, the federal consent being given by law, that verbal consent is commonly taken as sufficient over possessory claims and that when by its construction it becomes a fixed easement, even the patented title recognizes the validity of the title to such ditch.—*Tynon v. Despain, 43 P. 1039; Stoner v. Zucker, 83 P. 808.*

Condemnation Where Necessary.

Where it is to be built across claims or other lands whose owners refuse consent, condemnation proceedings are necessary under the Eminent Domain Acts, notwithstanding the right of way granted to ditches by the Act of 1866. (R. S. 2339.) A ditch, when carried across mining claims already located, must recognize their prior possessory rights and pay damages as in other cases of condemnation.—*Titcomb v. Kirk, 51 Cal. 288; 5 M. R. 10; Jennison v. Kirk, 98 U. S. 453; 4 M. R. 504; Noteware v. Sterns, 1 Mont. 311; 4 M. R. 650.* It seems not necessary that the ditch owners should incorporate to condemn a right of way for ditches, though incorporation in such cases is usual and is always assumed to be necessary, in the absence of constitutional provisions dispensing with it such as § 7, Art. XVI, Colorado Constitution.

The flooding of land by a reservoir for supply of power to mines and smelters and for irrigation is a public use.—*Helena Power Co. v. Spratt (Mont.), 88 P. 773.*

Where a ditch was constructed without objection from the owners of the mining claims it crossed, but without condemnation proceedings, an attempt by the mine owners to destroy the ditch will be enjoined. The mine claimants are entitled to damages only.—*Miocene D. Co. v. Jacobsen, 146 F. 680.*

Irrigation Ditches are granted the same rights of way and the same right to appropriate water as ditches for mining purposes under § 2339 above printed. Neither has any class priority over the other.—*Union Co. v. Dangberg, 81 F. 73.* The first in time is first in right. They may in general be located and recorded in the same form as a mining ditch, except when otherwise regulated by statute.

The Colorado Act applies to reservoirs and ditches for any beneficial use and for the enlarging of the same. The form on page 196 is sufficient for an irrigating ditch by changing the purpose of the use.

Contract to enlarge a ditch so that it would be filled from a certain river construed to mean to make a ditch of a certain capacity and not a guaranty that the water would be there to fill it.—*Flick v. Hahn's Peak Co. 66 P. 453.*

A party contracting to supply water to a placer mine must furnish water fit for the purpose, and if the water furnished has come from a placer above, the duty is upon him to provide the necessary reservoirs to settle it.—*Gold Ridge Co. v. Tallmadge (Oreg.), 74 P. 325.*

Using such water as furnished was no waiver of damages for its defects.—*Id.*

For form of incorporation of ditch company see p. 323.

RIGHT OF WAY AND OTHER EASEMENTS.

State Power to Regulate Easements.

R. S. Sec. 2338.—As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.—*Sec. 5, A. C. July 26, 1866.*

Highways.

R. S. Sec. 2477.—The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.—*Sec. 8, A. C. July 26, 1866.*

By the terms of the above section 2477, roads and trails may be established without any license or formality over the public domain.—*Hobart v. Ford, 15 M. R. 236; 6 Nev. 77.*

By a very early statute in Colorado all claims are made subject to the right of way for hauling quartz (*R. S. § 4215*), and by another section (4216) parol license to build a road is valid without deed. Where such statutes do not exist at the time when a location is made the estate of the miner in his claim is exclusive and a road can not be laid across it, without his acquiescence, except by condemnation under the Eminent Domain Acts with

compensation in damages.—*Titcomb v. Kirk, 5 M. R. 10; 51 Cal. 288.*

Except where granted by the above section, 2477, or allowed by state statute enacted under the permission of section 2338 (which has a very limited scope) the title to an easement must be created by deed or other writing. That is to say, it is within the Statute of Frauds. It is true an easement may sometimes be sustained by estoppel or as an executed license, but if a good title is sought at the outstart it should be secured in writing in every instance.—*Highland Boy Co. v. Stickley, 116 F. 852.*

Where a claim over which an easement exists is abandoned the rights of the holder of the easement are paramount to those of a relocator of the same land.—*Bonner v. Rio Grande S. R. Co. 72 P. 1065; Tuolumne Co. v. Maier, 66 P. 863.*

A Mineral Patent Does Not Divest a Valid highway already on the ground when patent was applied for. And when construed in connection with the Act of Congress and the power of the State to regulate easements it would seem that the patent would be subject to any valid subsisting easement affecting the ground prior to the application. Such an easement saves itself and needs not to be protected by filing an adverse claim.—*Rockwell v. Graham, 9 Colo. 36; 15 M. R. 299; Jacob v. Day, 44 P. 243.*

Annual Labor.

The building of trails or roads for the benefit of a claim counts as annual labor or towards making up the $500 improvements required before patenting. *See page 100.*

One Tenant in Common can not by his general deed or license create an easement over the common claim in favor of a stranger.—*Pfeiffer v. University, 74 Cal. 156.* Nor has the general manager of a mine, power to grant an easement.—*Butte Co. v. Montana Co. 55 Pac. 112.*

A co-tenant has no right to use a drift on the vein as a tunnel to convey ore from outside property owned by himself alone.—*Laesch v. Morton, 87 P. 1081.* Nor to maintain a pipe line across the common ground for purpose other than the mining of it. —*Pioneer Co. v. Shamblin, 37 So. 391.*

Tramways, Canals, Electric Power Lines.

By various Acts of Congress the right of way through public lands is given to tramways, canals, ditches, reservoirs and lines for distribution of electric power. Reference to the several Acts and the regulations of the Secretary of the Interior promulgated thereunder will be found in *31 L. D. 13; 33 Id. 451, 503;* especially with regard to the permit required where the line crosses a government reservation. See also *18 L. D. 168; 27 L. D. 495.*

By A. C. May 21, 1896, *29 St. L. 127*, oil pipe lines in Colorado and Wyoming are given free right of way over the public land.

Eminent Domain.

Acts to condemn ditches are found in all the arid States.

By Colorado Act of 1907 an aerial tramway, or pipe line, is allowed to condemn its right of way. The validity of such statutes depends upon whether mining is a public use; for, if not a public use, the statute is void. The tendency of the decisions is to sustain them.—*Clark v. Nash, 198 U. S. 361.*

It has been held a public use in Nevada.—*Dayton M. Co. v. Seawell, 5 M. R. 424; Byrnes v. Douglass, 19 M. R. 96; 83 F. 45.* And in Utah, *Highland Boy Co. v. Stickley, 78 P. 296.* And in Montana, *Helena Power Co. v. Spratt, 88 P. 773.*

But otherwise in California; *Cons. Channel Co. v. C. P. R. Co. 5 M. R. 438; Amador M. Co. v. Dewitt, 73 Cal. 482.*

A distinction has been made where the easement is intended only for the private benefit of the condemnor and where intended to supply the public generally, being allowed in the latter instance and

denied in the former.—*Great Western Co. v. Hawkins, 66 N. E. 765; Miocene D. Co. v. Lyng, 138 F. 544.*

Provision for condemnation by electric power companies and by mines seeking to connect with railroads is found in the Colorado R. S. Secs. 2459, 2460. Any mine owner may condemn land to connect with a railroad. Sec. 2464.

Right of Way to Tunnel.

See TUNNEL SITE.

DUMP.

The Right to Dump is but little if at all affected by statutory regulations, and the right to dump, as of necessity or by custom, across lower claims, has never been brought under the adjudication of the Court of last resort in any of the mining States, to the writer's knowledge; but in the case of *Equator Co. v. Marshall Co. U. S. C. Ct. Colorado,* an action brought to restrain the dumping across a claim lying below on the mountain slope, it was *held,* as of course, that it was no case for injunction, unless where work was being prevented, shafts filled, life endangered or other gross and continuing injury, and the remedy, if any, was by action at law for damages.

In a later suit in the same Court between the same parties it was *held* that when continuous dumping had been carried on by owners and lessees, without proof or attempt at proof, as to the injury done by each party, that only nominal damages could be recovered against an owner, and that the owners were not responsible for the injuries done by their lessees; and there being no proof that the defendant, one of the owners, had ever taken an active part in the management of the mine, the jury found for the defendant.—See also *Little Schuylkill Co. v. Richards, 10 M. R. 661; 57 Pa. 142.*

In the case of continuous and indiscriminate dumping over lower claims it may, if not in the meanwhile regulated by statute, be finally recognized as a controlling custom and so fixed as a permanent easement on the lower claims.

In the case of careless or wanton injury to improvements the upper claim is, of course, liable; but the right to dump over unimproved and valueless surface ground is doubtless such an easement as may be prescribed by state statute under the permission of R. S. § 2338, ante p. 202, or allowed by district rule.

The owner of a gypsum bed cannot make his neighbors' land a convenience to dump his waste on. —*White v. Lansing, 103 N. Y. S. 1040;* and having covered up an acre of such ground defendant was decreed to remove it or pay damages at plaintiff's election. But the damages in cases when the cost of removal would exceed the value of the land cannot exceed the amount of such value.—*Harvey v. Sides M. Co. 1 Nev. 539.*

A Dump Is Real Estate and passes to the grantee without special mention. But a contract to sell the ore found in it need not necessarily be by deed.—*Smart v. Jones, 15 Com. Bench, N. S. 717.* Dump deposited on the land of another and allowed to remain indefinitely becomes parcel of the land.—*Lacustrine Co. v. Lake Guano Co. 82 N. Y. 476; Erwin's App. 12 Atl. 149; 16 M. R. 91.* A deposit of tailings becomes an accretion to the land.—*Rogers v. Cooney, 14 M. R. 85; 7 Nev. 213.*

Under a mining lease in general terms the lessee has the right to work over the dump, but the wording of the lease may be such as to exclude dumps by construction.—*Boileau v. Heath, L. R. (1898), 2 Ch. 301; Genett v. Delaware Co. 43 N. Y. Sup. 589; 25 N. E. 922.*

The right to dump may be lost by allowing adverse possession of the ground for the statutory period.—*McLaughlin v. Del Re, 16 P. 881.* Eject-

ment lies to recover ground used for tailings.—*Campbell v. Silver Bow Co. 49 F. 47.*

The lessee has no property in the dump after his term has expired; nor, during term, to minerals not contemplated in his lease.—*Erwin's App. 16 M. R. 91; 12 Atl. 149; Doster v. Friedensville Co. 21 Atl. 251.*

Construction of contract to work dump.—*Foster v. Lumbermen's Co. 36 N. W. 171.*

Appurtenance.

It has been held that the grant of a tunnel right carries with it as an appurtenance the right to dump on the grantor's land at the mouth of the tunnel.—*Scheel v. Alhambra Co. 79 F. 821.*

MINERAL LAND.

Contests With Non-Mineral Claims.

The question: What is mineral land? arises in contests between mineral and agricultural claimants, between mill site and lode claimants, in timber cutting cases, indirectly in contests as to the exception of known lodes from placers and in other instances. Where it is the duty of the land department to decide this point before they issue patent their decision is final.—*Gale v. Best, 17 M. R. 186; Traaphagen v. Kirk, 77 Pac. 58; Patterson v. Ogden, 74 P. 443; 34 L. D. 401.*

Evidence that land in the vicinity is mineral is admissible as proof of the mineral character of the land in controversy.—*U. S. v. Rossi, 133 F. 380.*

On the other hand it is held that a man may enter land as agricultural where no oil has been actually discovered on the tract although oil is found in the neighborhood and the entryman selected it for its supposed mineral values.—*Olive Co. v. Olmstead, 20 M. R. 700; 103 F. 568; Bay v. Oklahoma Co. 73 P. 936.*

The subsequent discovery of mineral after a vested right in a non-mineral location does not invalidate the location.—*Cleary v. Skiffich, 21 M. R. 284; 65 P. 59.* Discovery of coal after entry will not defeat the issue of his patent to a homestead claimant.—*21 L. D. 92; Colo. Co. v. U. S. 123 U. S. 308.* The test in agricultural contests is one of comparative values.—*Hunt v. Steese, 75 Cal. 621; 17 P. 920.* A discovery justifying further exploration makes the land mineral.—*19 L. D. 455.*

Discovery of colors and fairly good prospects is not enough to establish the mineral character of land as against a prior homestead entry.—*Steele v. Tanana Mines, 148 F. 678.*

The ruling of the Land Department in a contest that the land is non-mineral, in the absence of fraud or mistake, is binding on the Courts and not subject to collateral attack.—*Old Dominion Co. v. Haverly, 90 P. 333; Le Fevre v. Amonson, 81 P. 71.* The fraud must be extrinsic to the issue passed upon by the Department.—*Craig v. Roberts, 92 P. 97.*

The mineral value of the land, to defeat an agricultural entry, must be substantial. Abandoned works are not enough.—*U. S. v. Blackburn, 48 P. 904.* The panning of colors on surface held on the facts not enough to defeat a prior homestead entry.—*Steele v. Tanana Mines, 148 F. 678.*

PLACERS.

Open to Location and Patent.

R. S. Sec. 2329.—Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.—*Sec. 12, July 9, 1870.*

Size of Claim—Legal Subdivisions.

R. S. Sec. 2330.—Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona-fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona-fide settler to any purchaser.—*Id.*

Twenty Acres to One Locator.

R. S. Sec. 2331.—Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two shall conform as near as practicable with the United States system of public-land surveys, and the rectangular sub-divisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.—*Sec. 10, May 10, 1872.*

Building Stone Act.

That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.—*A. C. Aug. 4, 1892.—27 Stat. L. 348.*

Location and Certificate—Notice and Stakes.

R. S. Colo. Sec. 4205.—The discoverer of a placer claim shall, within thirty days from the date of discovery, record his claim in the office of the recorder of the county in which said claim is situated, by a location certificate, which shall contain: First, the name of the claim, designating it as a placer claim; second, the name of the locator; third, the date of location; fourth, the number of acres or feet claimed; and fifth, a description of the claim,

by such reference to natural objects or permanent monuments as shall identify the claim.

Before filing such location certificate the discoverer shall locate his claim: First, by posting upon such claim a plain sign or notice, containing the name of the claim, the name of the locator, the date of discovery, and the number of acres or feet claimed; second, by marking the surface boundaries with substantial posts, and sunk into the ground, to-wit: one at each angle of the claim.—*March 12, 1879.*

Legislation Concerning Placers.

Placer claims were not covered by the original A. C. of 1866.

The Act of 1870 brought them within Congressional recognition and made them open to patent.

They have been at all times regulated as to size, labor, mode of location, etc., by the district rules to a much greater extent than lode claims.

Placer Defined.

As commonly and properly understood a placer claim means a location in which gold is found loose in sand or gravel and not in the vein or in place; it includes gulch claims, old channels, cement and drift diggings.

Mining Claims Divided Into Lodes and Placers.

But the U. S. Mining Acts make an arbitrary division of all minerals into two classes, to wit: lodes and placers. All deposits of (metallic) minerals in place are called, when located, lode claims, and all deposits of other minerals in place or not in place, are placers.—*Gregory v. Pershbaker, 15 M. R. 602; 73 Cal. 109.*

Distinction Between Lode and Placer.

In *Webb v. American Asphaltum Co. 157 F. 203*, a placer location had been made on a string shaped deposit of asphalt. Later lode locations were made over it. The issue turned on whether it was lode or placer ground. The Court held that the issue was determined by the form of the deposit and the formation being fissure like and in place it was a lode, dis-

carding entirely the non-metallic character of the mineral. In *U. S. v. Iron S. Co. 128 U. S. 679*, the Supreme Court had said: "By 'veins or lodes,' as here used, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock." And in *St. Louis Co. v. Kemp, 104 U. S. 649*, occurs this clause: "A mining claim is a parcel of land containing precious metal in its soil or rock." But in neither of these last two cases was the point directly involved and the use of the word "metal" is therefore not of binding force. The *Asphaltum Co. case* is therefore thus far the authoritative decision on this important question and we so print it with the qualification that it remains for the ultimate adjudication of the Federal Supreme Court before we can concede that it is a correct exposition of the law. The latest ruling of the Land Department coincides with the holding in the *Asphaltum Co. case, 35 L. D. 652.*

Other Non-Metalliferous Deposits.

Discarding the rare cases instanced in the foregoing paragraph where non-metallic but valuable mineral substances are found in fissure or lode like formation, the uniform practice is to locate them as placers and the Department has so ruled as to many specific minerals.

Deposits of alum, asphaltum, soda and sulphur may be patented as placer ground.—*Circular 1 L. D. 572, Rev. Ed. 561;* also kaolin or fire clay, *1 L. D. 579, Rev. Ed. 565; 17 L. D. 550;* borax beds, *2 Id. 707;* auriferous cement, marble, mica and slate, *25 Id. 354; 35 Id. 652;* gypsum, *Id. 29; Id. 181;* limestone, *17 L. D. 82;* phosphate, *18 Id. 58; 26 Id. 600.*

Oil Lands.

Ever since the passage of the placer mining Act, lands valuable for deposits of petroleum were considered as open to location and patent as placer

claims and as such, records were made followed by entries and patents as a matter of ordinary course. —*4 L. D. 60, 284; 16 Id. 117.* And such action of the Land Office was followed by the courts in dealing with oil located or patented as placer ground without question of its regularity.—*Gird v. California Oil Co. 60 F. 532; Van Horn v. State, 40 P. 964.*

After this unbroken procedure of more than twenty years, the Land Office in 1896 (*Union Oil Co. 23 L. D. 222*) abruptly held that oil was not a mineral and oil lands therefore not subject to entry. This was immediately followed by an Act of Congress making such lands in terms patentable as placers.—*29 St. L. 526, post p. 514.* The ruling itself which induced the confusion was later reversed by the Secretary of the Interior.—*25 L. D. 351.* The judicial rulings that oil is a mineral have been uniform.—*Thompson v. Noble, 11 M. R. 137; Gill v. Weston, 110 Pa. 317* barring the anomalous case of *Dunham v. Kirkpatrick, 101 Pa. 36.* They are located and held like any other class of placers.—*Wolfskill v. Smith, 89 P. 1001.*

Salines were the subject of congressional legislation for many years prior to the Mining Acts of 1866-72. Under those Acts they were still treated as neither lode nor placer but open to entry under special statutes until January 31, 1901, when they were declared to be placer ground.—*31 St. L. 145.*

Quarries—Building Stone.

Land "chiefly valuable for building stone" may be located and patented as a placer claim. A. C. Aug. 4, 1892, *ante p. 209.* If such stone is found on unsurveyed land this is the only procedure to secure title. Under the Department rulings any stone of special commercial value is held to be placer ground. —*15 L. D. 370; 16 Id. 508.*

Stone Land cannot be located or patented as a lode claim.—*23 L. D. 353, 395; Wheeler v. Smith, 32 P. 784.*

Stone—Timber.

But under the Timber and Stone Acts of 1878 and 1892 if on a surveyed section land is found which is "valuable chiefly for stone" it may be filed upon and title obtained by procedure much more expeditious and simpler than by locating it as a placer and with no necessity of annual labor or $500 expenditure.

The other principle prerequisites are that the land do not contain "valuable deposits of gold, silver, cinnabar, copper or coal" that it is "unfit for cultivation," "uninhabited" and contains no hostile improvements.

The applicant makes no local staking or record but applies to the Land Office direct, to purchase, by filing sworn statement that the land and the applicant come within the terms of the Act. Sixty days publication is then made, followed by proof by two witnesses of the character of the land; whereupon the applicant if no protest has been filed enters and pays for his 160 acres at $2.50 per acre.

Exactly the same form and procedure applies to land "chiefly valuable for timber."

The Acts are printed on p. 521 and blanks and instructions for such entries are furnished on request by any local Land Office.

Location Without Specific Mineral Value.

Some of the decisions of the department aided by the Act of 1892 allowing quarries to be entered were sufficiently loose to allow a claim to be laid upon any ground; for either what can be called building stone, or a color of gold in the pan, can be found practically anywhere—but the obviously needed declaration was at length made that land could not be taken up as placer ground on mere wash or because a color could be panned, its real value being on account of its proximity to lode claims. It must contain mineral in paying quantities.—*Royal K. Placer, 13 L. D. 86.* Nor where it had

no characteristic of any form of placer.—*Searle Placer, 11 L. D. 441.*

Discovery or Knowledge of Mineral Value.

Unless specifically required by State Statute or District Rule no discovery shaft is required, but the Act of Congress implies that mineral shall have been found before the right to locate upon the same as a placer claim accrues.—*13 L. D. 86.*

A discovery of the mineral sought for upon the claim is held to be essential to a valid placer location of any kind. Surface indications or knowledge of its existence upon adjoining lands is not enough.—*Nevada Oil Co. v. Miller, 97 F. 688; Nevada Co. v. Home Co. 98 F. 673; Olive Co. v. Olmstead, 103 F. 568; Weed v. Snook, 77 Pac. 1023.*

A discovery pit or shaft on a vein shows to the eye a mineral formation specifically distinct from the surrounding country. A pit or shaft on placer gravel shows nothing of that sort. A pit or shaft on any of the various minerals claimed as statutory placers might or might not show such indication. Such working is not essential to the disclosure of mineral value on this class of claims. But it is clear from the implied requirement of knowledge or discovery of mineral character, that the ground about to be located must have a special value as either placer proper or for some special deposit treated as placer ground under the statute, and that merely surveying and recording vacant land as and for placer ground without known value under either class is a void proceeding when properly contested or attacked.

Discovery is as essential on a placer as it is on a lode claim.—*Steele v. Tanana Mines, 148 F. 678.* Panning colors on surface of deep gravel drift, known to be gold bearing by work to bed rock in the near locality, makes a good discovery.—*Lange v. Robinson, 148 F. 799.* There must be "such a discovery of gold as to give reasonable evidence that the ground is valuable for placer mining."—*Charlton v. Kelly, 156 F. 436.*

A Separate Discovery on Each Twenty Acres is not required where there has been a joint location of 160 acres.—*McDonald v. Montana Co. 35 P. 668; Kirk v. Meldrum, 21 M. R. 393; 28 Colo. 453; Union Oil Co. 25 L. D. 351* overruling previous Land Office holding to the contrary.—*L. O. Reg. 19.*

Use of Names—Nominal Association.

It requires *eight bona fide* locators to lawfully claim 160 acres. The names of nominal parties are often used to locate placer ground, and such nominal association is not questioned in land office proceedings, but its validity may well be doubted when contested in court. Such use of names with agreement to reconvey without consideration, has been held void as against public policy.—*Mitchell v. Cline, 24 P. 164; Durant v. Corbin, 94 F. 382.*

In *Gird v. California Oil Co. 60 Fed. 532* the court held to a very strict construction on this point, and ruled that where three persons in the employ of a corporation located sixty acres it was good only to the extent of a single location of twenty acres.

The Excess over the acreage allowed to be located may be taken up by a stranger.—*Gohres v. Illinois Co. 67 P. 666.*

Size of Claim That May be Located is limited to 20 acres to each individual or person; of course a corporation is one person without reference to the number of its incorporators. An association of persons may locate a claim in common not exceeding 20 acres to each individual in the association, and not exceeding 160 acres to the entire association. A location by an association of 160 acres is but a single claim.—*Miller v. Chrisman, 73 P. 1083.*

Conformation to U. S. Sectional Subdivisions.

The Act speaks of making survey for the placer claim conform as near as possible with the rectangular subdivisions of the public lands, but under the early practice in the Land Office it was utterly disre-

garded—so much so as to allow patents to issue in fantastic shape obviously intended to secure the bed of streams or other irregular advantages. But under the present practice on surveyed sections strict conformity is required, the entry being confined to contiguous blocks of not less than ten acres each and a rectangular piece of ground when on unsurveyed ground—*32 L. D. 198, 363, 401; 30 Id. 225; 34 Id. 42, 44, 56, 260.* The applicant is not required by this provision to take in acreage wholly valueless for mining purposes.—*2 L. D. 764; 6 Id., 231.*

Where the mineral ground is confined within a narrow canon the location need not conform to the subdivisions.—*Mitchell v. Hutchinson, 76 P. 55.*

Procedure to Complete Location.

Presuming that free gold or some other valuable deposit other than a lode in place, is known to exist on the ground, the claimant, if he desires the benefit of the 30 days allowed the discoverer, should place a notice conspicuously as follows:

FORM OF PRELIMINARY NOTICE.

Gold Bug Placer Claim.

The undersigned claims 20 acres for placer mining purposes with 30 days from date to complete location and record. JOSIAH WINCHESTER.

January 9, 1908.

We do not consider that the above notice is essential in all cases, but it is customary. If the claimant was the actual first discoverer of the mineral it might not be required; but if the existence of the gold or other deposit had been a matter of common notoriety, we do not see why one person more than another could claim the time allowed to a discoverer without some such notice.

Proceeding to perfect the location the claimant must post upon the claim the statutory notice (*page 209*) which may be in form as follows:

LOCATION NOTICE.

Nellie Moore Placer Claim.

The undersigned claims *20 acres* for placer mining purposes, as staked on this ground. Date of discovery, January 9, 1908. JOSIAH WINCHESTER.

SECOND FORM.

Ballarat Placer Claim.

The undersigned claims *1320 feet* in length along the gulch by *660 feet* in breadth, for placer mining purposes, as staked on this ground. Discovered January 9, 1908.
T. S. WALTEMEYER.

Dates.

It will be noted that the notice on the stake in Colorado, must contain the date of *discovery* while the record must contain the date of *location*. The date when the posting and staking are completed would be such date of location.

Place of Posting.

Where not directed by statute or district rule such notice should be posted at the center point of the claim; or at some point where the prospecting pits show actual work. It should be conspicuous and either close to the apparent discovery or at the center as above suggested.

Stakes and Ties.

The locator then stakes his claim, placing a "substantial post," "sunk in the ground" at each angle of the claim. No center stakes are required. Accuracy and strictness in fixing and marking the boundaries cannot be too severely urged. Of course the discovery pit or some of the angles should be tied to "natural objects" or "permanent monuments" in order to make a proper location certificate or record. We advise the same as in case of lode claim. (*See page 52.*) A failure to stake invalidates the claim.—*Anthony v. Jillson, 16 M. R. 26; 83 Cal. 296.*

Location by Trespass.

The rule that a location cannot be initiated by trespass upon a prior valid possession applied in

contest where both claims were placers.—*Kirk v. Meldrum, 65 P. 633.*

Staking Government Subdivisions.

Whether staking is required where the claim is taken up by governmental subdivisions has been the subject of curious judicial rulings. It was held that the locator must stake out his claim the same as if he were locating on a private survey, in *White v. Lee, 21 P. 363.* This decision was followed by a case in Arkansas, *Worthen v. Sidway, 79 S. W. 77,* and just about the same time *White v. Lee* was overruled in *Kern Co. v. Crawford, 76 P. 1111.*

It would seem that the question could arise only where a full quarter section is taken up as one claim, for the government does not stake any smaller subdivisions, while it allows subdivisions as small as ten acres to be taken up. It does not follow that the original survey stakes are on the ground when the location is made, nor if they were would they afford the slightest notice that the quarter section had been located as a mining claim. In view of the contrary status of the rulings the only safe procedure is to stake *de novo.*

And yet the Land Office has ruled that no staking is required where any subdivision is taken. *22 L. D. 409.* Where the statute of any state requires staking as an item of the location the point should be clear to the contrary.

Record.

The notice being erected and the ground surveyed and staked, the location is complete and ready for record, the location certificate being in form as follows:

PLACER LOCATION CERTIFICATE.

KNOW ALL MEN BY THESE PRESENTS, That I, *Josiah Winchester,* of the City and County of *Denver,* State of Colorado,, claim, by right of discovery and location, the *Nellie Moore* placer claim, containing *twenty* acres (or 1320 feet in length by 660 feet in width), situate in *Cripple Creek* Mining District, County of *Teller,* State of *Colorado,* bounded and described as follows, to wit: Beginning at stake at corner No. 1: (*here insert description, giving a course to*

each line, and tying one or more corners to a government corner, well known natural object or permanent monument, etc.) Date of discovery, *Jan. 9, 1908.* Date of location, *Jan. 15, 1908.* Date of Certificate, *Jan. 16, 1908.*

JOSIAH WINCHESTER.

Description by claiming so many feet along the creek and so many feet on each side was sustained in *McKinley Co. v. Alaska Co. 183 U. S. 563.*

An amended location certificate may be filed the same as allowed for lode claims.—*Kirk v. Meldrum, 65 Pac. 634.*

The Statutory Requirements of the other mining States which provide for the manner of locating placer claims, are as follows:

Arizona.

1. Post notice containing name of the claim, name of locator, date of location and number of acres claimed, and description, with reference to natural object or permanent monument.

2. Mark boundaries with post or monument of stones at each angle of claim. Posts must be 4 inches (square) by 4½ feet long set 1 foot in the ground and surrounded by a mound of stone or earth. "When a mound of stone is used it must be at least three feet in height and four feet in diameter at the base."

3. Within 60 days after date of location, record with County Recorder a copy of the location notice.

Idaho.

1. Place post or monument, as required in location of lode claims, at each corner, and place on one of these a notice of location containing date of location, name of locator, name and dimensions of claim, the mining district (if any), and County; also the distance and direction from such post or monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself, the location of the claim.

2. Within 15 days after making the location, make an excavation on the claim, for the purpose of prospecting the same, of not less than 100 cubic feet.

3. Within 30 days after the location, record with County Recorder or with Deputy Recorder of mining district, a substantial copy of the location notice, verified as in the case of lode claims. (*p. 65.*)

Montana.

1. Post notice at point of discovery, containing name of the claim, name of locator, date of location and number of acres of superficial feet claimed.

2. Within 60 days from date of posting, the equivalent in work of a 10-foot shaft must be done upon the claim.

3. Within 30 days from date of posting, mark boundaries in same manner as required in case of lode claims.

4. Within 60 days from date of posting, file with Clerk of County a certificate of location containing same as notice posted, adding description of claim with reference to natural object or permanent monument, and "the dimensions or area of the claim and the location thereon of the discovery shaft, cut or tunnel." This certificate must be verified by one of the locators.

Nevada.

1. Post upon a tree, rock in place, stone, post or monument, a notice of location containing the name of the claim, name of locator, date of location, and number of feet or acres claimed.

2. Mark surface boundaries and the location point in the same manner and by same means required for lode claims; on surveyed land when taken by legal subdivision, only the location point need be marked. (*p. 65.*)

3. Within 90 days after posting the notice of location, perform not less than $20 worth of labor upon the claim for the development thereof and record with District and County Recorder a certificate which shall state the name of the claim, designating it as a placer claim; name of the locator; date of location; number of feet or acres claimed and description of the claim with regard to some natural object or permanent monument so as to identify the claim and the kind and amount of location work done and the place on the claim where said work was done.

Utah.

The statutory provisions as to location and record of lode claims (*p. 68*) apply also to placer claims, the notice and record in cases of placers giving the number of acres or superficial feet claimed.

Washington.

1. Post in a conspicuous place at the point of discovery a notice containing name of the claim, name of the locator, date of discovery and posting of notice, which is considered date of location, description by reference to legal subdivisions if on surveyed lands, otherwise with reference to natural objects or permanent monuments.

2. Within 30 days from discovery distinctly mark the location on the ground so that its boundaries may be readily traced; marking must be done even if claim is located by legal subdivisions.

3. Within 30 days from the date of discovery record the notice (1) in the office of the auditor of the County.

4. Within 60 days from discovery perform labor equivalent in the aggregate to at least $10 worth for each 20 acres.

5. Upon performance of such labor file with the County Auditor an affidavit showing such performance and the nature and kind of work done.

The above paragraphs 4 and 5 do not apply to oil or gas placer locations.

Wyoming.

1. Securely fix upon the claim a plain notice containing the name of the claim, name of the locators, date of discovery and number of feet or acres claimed.

2. Mark the boundaries by substantial posts or stone monuments at each corner of the claim.

3. Within 90 days from discovery record with the County Clerk a location certificate containing the name of the claim, designating it as a placer claim, names of the locators, date of location and number of feet or acres claimed and description by such designation of natural or fixed objects as shall identify the claim beyond question.

Alaska, California, New Mexico, North and South Dakota, and Oregon have no specific statutory provisions for the manner of locating and recording placer claims, and in those States such locations are governed by district rules, where such rules exist, and by the terms of A. C. § 2324. *See p. 60.*

A placer location made according to the forms given for Colorado, would doubtless be sufficient in any of the above named States where district rules do not require more specific details.

A full set of instructions as to what makes a valid placer location in a territory having no specific statute on the subject is found in *Walton v. Wild Goose Co. 123 Fed. 209.*

No Reservation Against Patentee.

When patented under a location of the ground as a "placer mining or stone quarry claim" the patentee owns all minerals found within its bounds except known lodes—*Freezer v. Sweeney, 21 P. 20.* And doubless he owns to the same extent under a location before patent subject to the right to locate lode discoveries over the same ground, and except lodes apexing outside but dipping underneath.

Homestead.

Lands located and used as a placer and also used as a residence by the owner, may be selected by him as a homestead, under the State law of exemptions, the question of title in the United States being excluded.—*Gaylord v. Place, 33 P. 484.*

Area in Feet or Acres.

By the following table the number of feet necessary to include any desired number of acres when in the shape of a square or parallelogram may be ascertained:

Claim	660	x	330	feet	contains	5	acres.
"	500	x	500	"	"	5.73	"
"	660	x	660	"	"	10	"
"	1320	x	660	"	"	20	"
"	800	x	1089	"	"	20	"
"	933⅓	x	933⅓	"	"	20	"
"	1320	x	1320	"	"	40	"
"	2640	x	2640	"	"	160	"

43560 square feet equal one acre. A square 208.71* feet in length and width makes one acre.

PLACER CONTAINING LODE.

Claim Intersected by Lode.

R. S. Sec. 2333.—Where the same person, association or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent

for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.—*Sec. 11, May 10, 1872.*

Known Lodes Excluded.

An application for patent to a placer claim is not supposed to include any known lode running through it, unless such lode is owned by the applicant and especially designated in the application, but it covers any after discovered lode.—*O'Keefe v. Cannon, 52 F. 898.*

The placer patentee acquires no title to lodes known to exist prior to and not included in his application.—*Clary v. Hazlitt, 67 Cal. 286.*

The exception of known lodes does not apply to placer patents issued on entries prior to May 10, 1872. —*Cranes G. Co. v. Scherrer, 66 P. 487.*

What Are Known Lodes.

Where a lode within the placer lines has been discovered, located and recorded, and has kept up its labor to the time of the placer application, it is clear that such is a "known lode" beyond any possible danger of construction.

But lodes, which though known have not been considered worth locating, or after location have been abandoned, or where they have been known as a matter of common knowledge to be within the lines, as in the case of outcrops not considered worth working, are not such known lodes as are excluded from a placer patent.—*McConaghy v. Doyle, 75 P. 419.*

A placer application was adversed by two lodes, but won the adverse suits, and its patent issued: Held, that this was no adjudication of the non-existence of a known lode even within the area in conflict with the adversing lodes as against parties not claiming under the defeated lodes.—*Butte Co. v. Merriman (Mont.), 80 P. 675.*

Known But Not of Known Value.

It has been with much reason held that a lode or vein though known to exist but having no such value as would justify its exploration or working, or by like expression to the same effect—is not within the exception of the patent.—*O'Keefe v. Cannon, 52 F. 898; Brownfield v. Bier, 39 P. 461; Butte Co. v. Sloan, 40 P. 217.* It must be a lode of known practical value for working.—*Montana Ry. v. Migeon, 68 F. 811; 77 F. 249; Casey v. Thieviege, 48 P. 394.*

The allegation in an answer that there were no known deposits of sufficient value to pay—is a proper plea of no known lodes and does not state a conclusion of law.—*O'Keefe v. Cannon, 52 F. 898.*

Known But Not Recorded.

It was held in *Noyes v. Mantle, 127 U. S. 348; 15 M. R. 611,* that a located claim was a known lode. But in *Iron Silver Co. v. Starr Co. 143 U. S. 394; 17 M. R. 436,* the Supreme Court go further and hold that it is sufficient to exclude it that it be a lode known to exist, and that where a lode has been notoriously cut in a tunnel within the claim, it was such a disclosure of the vein as to bind the patentee to a knowledge of it. And while holding (p. 404) that not every outcrop or crevice suggesting mineral would constitute a known lode within the class to be excepted, yet any vein disclosed and understood to be of value was excluded, and whether a vein was known and was of such character as to be excluded was a question of fact for *nisi prius* decision by jury.

The mere fact that a lode record has been made over the ground now claimed as placer does not prove that there was a vein on which to record.—*23 L. D. 476; Butte Co. v. Sloan, 40 P. 217.* And when the fact of lode or no lode has been left on conflicting evidence to the jury the court will not set their finding aside.—*Id.*

A lode known to exist before, may be located after, the patent issues; and it is known to exist

when the patentee knew of it, when it was matter of general knowledge or when an examination of the ground should have disclosed it, but lodes so low in assay as not to be workable are not excepted whether known or not.—*Mutchmor v. McCarty, 87 P. 85.*

To Whom Known.

In the *Mike & Starr case* it was held that it must be known to the applicant or to the community in general. If obvious to casual inspection, knowledge was chargeable to the owner. But a lode discovered, located and of record before the patent application, is a known lode whether or not the patentee had knowledge of it.—*Noyes v. Mantle, 15 M. R. 611; 127 U. S. 348.*

In the case of *Reynolds v. The Iron Silver Co. 116 U. S. 687; 15 M. R. 591,* the court ruled that the lode in or underlying the Wells & Moyer placer being shown to be known to the applicants, could not be recovered by them in ejectment as against adjoining lode owners who had worked beyond their side lines into the deposit.

Date of Discovery Material.

It had been held that the lode (to be an excepted known lode) must be discovered before entry but the date of application is now the conceded date. —*Dahl v. Raunheim, 132 U. S. 260; 16 M. R. 214; Mike & Starr case, supra.*

The application referred to is the application upon which the patent ultimately issues and the date of applicaton is the date of filing the paper "M" (*post p. 433*) in the course of proceedings to obtain patent.

Necessity of Adverse or Protest—Patenting Lode Over Placer.

If a known lode, whether held by strangers, or not located at all, though known to exist, is under the express terms of the statute as recognized by many decisions excepted from the grant—it would seem a necessary deduction that it need not file any adverse claim to preserve its rights. But if it be neglected either to procure an exclusion from the placer survey or to adverse and the placer patent issues, the Land Office will not as of course entertain an application to patent the lode. Before the application will be received it requires a hearing in the local Land Office after notice to the placer patentee as to whether in fact the lode was known to exist, and unless upon such hearing the fact is affirmatively so found, it denies the application.—*South Star lode, 20 L. D. 204; 27 Id. 676.*

If the finding is that the lode was known, the placer patentee is still at liberty to contest the lode application by showing and securing a judicial determination upon verdict that the lode was not known to exist.—*Alice M. Co. v. Street, U. S. Circuit Court, Denver, unreported.*

The practice of the Land Office has not been uniform upon this point, and for some years prior to the *South Star case* it had refused all applications to enter lode claims over placers except by consent of the placer patentee on the ground that the *ex parte* proof of no known lodes originally made by the applicant definitely established the non-existence of known lodes. And yet, in instances a patent to both lode and placer had been granted, as in *Iron S. Co. v. Campbell, 135 U. S. 286; 16 M. R. 218.* In that case each party having his proof of legal title in the shape of a patent, the question of priority was held to be an extrinsic fact to be found and settled by the jury under the instructions of the court.

The patent is held conclusive evidence that the land conveyed was placer ground.—*Dahl v. Raunheim, 132 U. S. 260; 16 M. R. 214; Butte Co. v. Sloan, 40 P. 217.* There are expressions in both these opinions which, taken by themselves, would read that the patent was conclusive proof that no lode existed, but to so decide on consideration of the whole case was evidently not the intention of the court.

The practical conclusion from this vexed state of the title, arising from the unwise reservation from a government grant of a piece of land with no defined bounds and even without acknowledged existence, is that a lode within placer lines should assert itself by adverse against the placer application at the outstart, so as to avoid subsequent Departmental inquiry.—*26 L. D. 573; 27 Id. 676.* And where the application is by the lode claimant over a prior placer patent, the safe course is for the placer to adverse if the facts exist upon which to contest the title of the lode claimant.

Proof of Known Lode by Contiguity.

Running a lode survey over placer lines raises no inference that the vein enters within them.—*Raunheim v. Dahl, 9 P. 892; 132 U. S. 260; 26 L. D. 622.* Nor is it sufficient that quite a number of shafts sunk elsewhere in the district disclosed horizontal deposits which might be parts of a vein of continuous extension through all that territory.—*Sullivan v. Iron Silver Co. 143 U. S. 431.* Nor does the granting of a patent subsequent to the placer patent over the placer ground raise any conclusive presumption. The question in such case is then an extrinsic issue dependent on proof.—*Iron Silver Co. v. Campbell, 135 U. S. 286; 16 M. R. 218; 25 L. D. 460.*

Locating Lode Within Placer.

The placer owner, or a stranger with his consent, may locate a lode claim within the placer survey.—*McCarthy v. Speed, 77 N. W. 590.* And doubtless the discoverers without such owner's consent

by peaceable entry may make such location.—*1 Lindley, § 413.*

It has been held that no third party can enter within the lines of a placer location to prospect for lodes. And if he does so enter, discover and locate a lode it is a claim initiated by trespass and is void. —*Clipper Co. v. Eli Co. 194 U. S. 220.*

This practically gives all blind lodes to the placer owner and thereby defeats the intent of the Act of Congress. But it is within the limits of judicial construction and is therefore a binding authority to the extent of the decision. But it does not go to the extent of preventing an entry to locate upon a visible outcrop; nor can a placer location be so made as to cover the lode formations unless it is properly placer ground and has a valid existence as a *bona fide* placer claim.—*Searle Placer, 11 L. D. 441.*

Where the claim is a placer alleged to carry gold, it should be gold that can be "secured with profit."—*U. S. v. Iron S. Co. 128 U. S. 684.*

In contest between a placer claim and an older lode title which the placer lines enclosed the burden of proof is on the placer to show that there was no such metallic vein as justified a lode location.—*Bevis v. Markland, 130 F. 226.*

Width of Such Lode Claim.

Where the location of the lode is made within the bounds of the placer location, and after the date of the placer location, it has been held that the lode claimant is restricted to fifty feet in width.—*Mt. Rosa Co. v. Palmer, 56 P. 176.* But where the lode was not only known to exist, but was a valid location prior to a placer location, the lode is entitled to its full width as staked against the placer locator or patentee.—*Noyes v. Mantle, 127 U. S. 348; 15 M. R. 611. See 28 L. D. 41; 32 Id. 513.*

TAILINGS.

Each Claim Must Take Care of Its Own.

R. S. Colo. Sec. 4214.—In no case shall any person or persons be allowed to flood the property of another person with water, or wash down the tailings of his or their sluice upon the claim or property of other persons, but it shall be the duty of every miner to take care of his own tailings, upon his own property, or become responsible for all damages that may arise therefrom.—*Sec. 9, Nov. 7, 1861.*

The Relation of One Claim to Another where both are situate in the same gulch or on the same waterflow was sought to be regulated by the above section passed at an early date which fixed in terms a matter of long continued dispute in California. The tendency of the later decisions is to the effect that the upper claim cannot justify covering up the lower claim on the plea of either custom, priority or necessity.—*Lincoln v. Rodgers, 14 M. R. 79; 1 Mont. 217; Fitzpatrick v. Montgomery, 50 P. 416.*

Upper and Lower Claim in Same Gulch.

Notwithstanding the above Act or similar local legislation elsewhere, the natural invitation of the stream to utilize its current is a temptation too potent to be resisted. No placer, barring exceptional instances, can be conveniently worked without encroaching more or less upon the claims below. This leads on the one side to trespass, on the other side to concessions, and their relations thus become involved with questions of license, contract and estoppel.

The legal right of the claim to be exclusively enjoyed by its own occupant is plain with or without the aid of the Statute, subject to such considerations as courts of equity will give to the hardship of denying the use of a natural outlet to a claim so situate to its neighbors on the stream below that its use of the stream is a physical necessity. The upper claim is therefore not denied the right to rush its tailings

across the lower claim if they are not allowed to lodge upon such claim. A claim staked and recorded below for dumping purposes would also forestall the location of the same ground for mining purposes, except subject to the prior easement of the right to deposit tailings.

Slight Injury to Lower Claims.

The owner is not liable for pollution of stream incidental to placer mining, or to washing iron ore. It is classed among non-actionable injuries. Nor will such use of the stream be enjoined even if an action lies, except in wilful or extreme cases.—*Clifton Co. v. Dye, 6 So. 192; Hill v. King, 4 M. R. 533; 8 Cal. 337; Atchison v. Peterson, 1 M. R. 583; 20 Wall. 507.*

But a material injury will be prevented by writ or compensated by damages.—*Columbus Co. v. Tucker, 26 N. E. 630; Tennessee Co. v. Hamilton, 14 So. 167; Drake v. Lady Ensley Co. Id. 749; Hindson v. Markle, 33 Atl. 74.*

A Boom Ditch was enjoined in *Carson v. Hayes, 65 P. 814,* and hydraulics in *York v. Davidson, Id. 819.*

Injunctive Relief Against Deposit of.

Where there is neither license nor the protection of a prior location for tailing purposes and the ground below has been taken up by other parties, it is plain that the upper cannot lawfully use the lower claim as a place of deposit.—*Fuller v. Swan River Co. 16 M. R. 252; 12 Colo. 12; Cheesman v. Hale, 79 P. 254.* To do so would be an invasion of the legal rights of the lower claimant for which he might recover damages, but it does not follow that in every case the courts would interfere to restrain the upper claimant by injunction.

And if the lower claims could be shown to have been located or purchased for any purpose of annoyance to the upper claims, the want of equity in such case upon an application for injunction, would be manifest.—*Edwards v. Allouez M. Co. 7 M. R. 577;*

38 Mich. 46. Placer company enjoined at suit of water works against fouling stream.—*Travis Co. v. Mills, 94 F. 909.* At suit of the county as a public nuisance. *Yuba County v. Kate Hayes Co. 74 P. 1049.*

The incidental flow of mud and fine tailings not sufficient to accumulate as deposit, but affecting only the character of the water or causing but slight damage, if an injury at all, is not such as to be interfered with by injunction.—*Atchison v. Peterson, supra; U. S. v. N. Bloomfield Co. 53 F. 631.*

An injunction against tailings will not issue where there is a remedy at law and the injunction would result in the discharge of a great number of employees.—*McCarthy v. Bunker Hill Co. 147 F. 981.*

Where a coal company could by reasonable outlays prevent stream pollution a preliminary injunction should be allowed.—*Roaring Creek Co. v. Anthracite Co. (Pa.) 61 Atl. 811.*

Injunction refused against smelter fumes destroying timber and plaintiff left to its remedy at law for damages.—*Mountain Cop. Co. v. U. S. 142 F. 625.*

Complaint for damage from tailings and stream pollution set forth at length and held sufficient.—*Hill v. Standard M. Co. (Ida.) 85 P. 907.*

Injunction against smelter fumes refused if defendant pay actual damages. Comparative values of the investment and the property injured considered. —*McCleary v. Highland Boy Co. 140 F. 951.*

Where several mills or mines contribute to the common injurious result, they may be sued jointly where injunctive relief is asked, but for damages must be sued separately, and where several neighboring plaintiffs suffer a common injury they may join in the equity proceeding, but in an action for damages each party must sue and defend separately. —*Madison v. Ducktown Sulphur Co. 83 S. W. 658; Warren v. Parkhurst, 92 N. Y. S. 725; Strobel v.*

Kerr Salt Co. 58 N. E. 142; 21 M. R. 38. Watson v. Colusa-Parrot Co. 79 P. 14.

Tailings Are Property of the Miner Who Made them, so long as retained on his own land or under his control and not abandoned.—*Jones v. Jackson, 9 Cal. 237; 14 M. R. 72.* When allowed to flow upon the land of another he becomes entitled to them.—*Id.* They belong to the lessee for the time being—but not after he has ceased acts of ownership.—*Erwin's App. 16 M. R. 91; 12 Atl. 149.*

Location of Dump Ground.

It has been held in *Jones v. Jackson, supra,* that a reasonable amount of ground below a mining claim proper, may be located as a dump or place of deposit for tailings. The same case holds that mere posting of notice would not be sufficient to hold such ground. We would advise as strict a location, including staking, notice and record as should be made in the case of the location of the mining or ditch claim, to which such tailings claim may be appurtenant. In the nature of things the boundaries of such a claim also would be strictly confined to the absolute needs of the upper claim; nor do we consider that such located easement would hold indefinitely without user. It is a claim not so much of express right as of necessity. The doctrine, however, that an easement may be created on public land is distinctly held in the above case, and in *Lincoln v. Rodgers, supra; O'Keiffe v. Cunningham, 9 M. R. 451; 9 Cal. 589.* In *Miser v. O'Shea, 62 P. 491,* such right is expressly denied.

A deposit of valuable tailings on public land will be protected against an attempt to locate the same as a placer.—*Ritter v. Lynch, 123 F. 930.* The word "tailings" by usage of the parties construed to include "slag."—*Butte Co. v. Montana Co. 121 F. 524.*

Mill Tailings.

A mill owner, though the prior appropriator, has no right to flow tailings into a stream when at slight cost they could be so impounded as not to materially foul the water.—*Suffolk Co. v. San Miguel Co. 48 P. 828.* A mill will not be allowed to so pollute the water as to render it unfit for use by prior irrigation appropriators.—*Montana Co. v. Gehring, 75 F. 385.*

The rights and duties of two mills using the same water, one above and one below, are fairly stated in *Otaheite Co. v. Dean, 102 F. 929.*

Location Upon Deposits of Tailings.

Vacant land upon which tailings have been deposited may be claimed and worked the same as land containing natural deposits, and trespass maintained by the claimant against a party carrying away such tailings.—*Rogers v. Cooney, 14 M. R. 85.*

A party may take up a claim for mining purposes which has been and still is used as a place of deposit for tailings by another—but in such case his mining right would be subservient to the prior right of deposit.—*O'Keiffe v. Cunningham, supra.* On the other hand the right to dump may be lost by allowing the mining claimant to hold exclusive adverse possession.—*McLaughlin v. Del Re, 16 P. 881.*

The Debris Cases.

On the plea of interference with navigable waters the United States has, on the San Joaquin and Sacramento Rivers, in California, prohibited all hydraulic mining, except under government license and regulation. The Act of 1893 (*27 St. L. 507. Amended, 1907. 34 St. L. 1001*) makes such mining a misdemeanor unless carried on by Federal supervision. This Act and the decisions under it is the final outcome of what SAWYER, J., candidly calls "a suit between the mining counties and valley counties."—*18 F. 792.* There are obvious constitutional points arising out of such an act, but it has been thus

far sustained.—*U. S. v. N. Bloomfield Co. 81 F. 243; 88 F. 664.*

A review of the progress of this struggle is fairly given in the opinion of HAWLEY J. in the last citation.

The reference to this act and to the opinion in 88 Federal Reporter, renders it unnecessary to further cite the numerous cases almost uniformly adverse to the miner, which led up to it. Some of them were so harsh as to suggest that judicial power had reached its limits.—*9th Ed. p. 182.*

NUISANCE.

Analogous to the last heading is the subject of actions against smelters for destruction of crops and other like injuries by noxious fumes; the pollution of streams, etc. The subject is fairly considered in *Madison v. Ducktown Sulphur Co. 83 S. W. 959,* which goes into the matter of doing justice between all parties where the injury is substantial but practically non-preventible without undue loss to the defendant.—*McCleary v. Highland Boy Co. 140 F. 951.*

The Statute of Limitations does not begin to run until the injury is complete.—*Sterrett v. Northport Co. 70 P. 266.*

Mine enjoined from polluting waters of stream used by distillery. *Young v. Bankier Distillery, L. R. App. C. 691* (1893).

The pollution of a fresh water stream by salt well was enjoined in *Strobel v. Kerr S. Co. 21 M. R. 38; 58 N. E. 142.*

MILL SITES.

Extent—How Patented.

R. S. Sec. 2337.—Where non-mineral land not contiguous to the vein or lode is used or occupied by the pro-

prietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.—*Sec. 15, May 10, 1872.*

Location and Record.

Mill sites are located by posting notice and staking by a substantial post or stake at each angle, which ordinary prudence would require to be inscribed with the name of the mill site and the number of the corner. There are no Congressional regulations of the details of such location, but their record should conform to the requirements applicable to the record of all classes of claims, to wit, that it contain a sufficient description by reference to natural objects or permanent monuments; which terms of the statute are no more than a statement of what is required as a matter of course without such statute. In other words, where any record whatsoever is essential to either original claim or conveyance, it must contain a description sufficient to identify the land intended to be described.

In Colorado the form in use is the statutory wording prescribed for all cases of location of non-mineral lands, *R. S., Sec. 5124.*

Post location notice at some conspicuous point on the claim, in substance as follows:

LOCATION NOTICE.

I claim the *Corinne* mill site as staked on this ground, 466 feet square. Five acres. Date of location Jan. 2, 1908. THOMAS W. FITCH, JR.

And make record in the proper county of the

LOCATION CERTIFICATE OF MILL SITE.

TO ALL WHOM THESE PRESENTS MAY CONCERN: Know ye that *I, Thomas W. Fitch, Jr., of Pittsburgh,* County of *Allegheny,* Commonwealth of *Pennsylvania,* do hereby de-

clare and publish as a legal notice to all the world that I have a valid right to the occupation, possession and enjoyment of all and singular that tract or parcel of land, not exceeding five acres, situate, lying and being in *Pioneer* Mining District, in the County of *Dolores*, in the State of Colorado, bounded and described as follows, to wit: The *Corinne* mill site, *beginning at corner No. 1, from which, etc.* (*description continued*) to the place of beginning.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness my hand and seal this *27th* day of *January*, in the year of our Lord one thousand nine hundred and eight.

THOMAS W. FITCH, JR. [SEAL.]

For form of acknowledgment see *page 252.*

A name is not *essential* to a mill site, but it is convenient and preferable to style it by a name.

Location and record should be accompanied or followed by substantial occupancy or valid improvements. The digging of a ditch is not the location of a mill site. "Land is appropriated by one character of acts, water by another."—*Robinson v. Imperial Co. 10 M. R. 377; 5 Nev. 44.*

By the U. S. Law They Are Limited to Five Acres, but by the district regulations were sometimes restricted to much less extent.

A square location 466.69x466.69 feet contains five acres.

They Cannot Lawfully be Located on Mineral land.—*8 L. D. 195; 18 Id. 105.* And if so located may be contested by proceedings in the Land Office.—*5 L. O. 51.*

The location of a mill site not known to contain mineral at the time of its location will hold against a lode claim based upon a discovery after the mill site location was complete. The finding of mere nominal lode values does not make the land mineral in character at any time and the discovery of real mineral values will not destroy a mill site completely located before any such mineral value was known.—*Cleary v. Skiffich, 21 M. R. 284; 65 P. 59.*

In *Hartman v. Smith, 14 P. 648*, it was held that a mill site was a mining claim and as such excluded from a town site patent. In *Cleary v. Skiffich, 28 Colo. 367*, the Court says "A mill site is a mining location." In the latter case the expression is a mere introductory clause. But to chance the exclusion from a town site patent of a mill site claim on the forced or technical meaning of one word, would be to assume grave risk. *Bona fide* prior location for ranch purposes will defeat a mill site.—*Hamburg Co. v. Stephenson, 17 Nev. 450.*

Two Classes of Mill Sites.

The latter clause of § 2337 *supra*, provides for patenting of land actually occupied by a mill, but the former and more important portion of the section provides a means of procuring surface area to cover such ground as may be used in any manner incidental to the mine.

First Class—Mill Site With Lode.

Congress allows to each lode claimant the privilege of taking up five acres of ground, upon the theory that such additional surface is, or may be, needed either incidentally for the operation of the mine (storage room, boarding houses, miners' cabins, ore houses, etc.) or indirectly by a mill, patio, arastra, or other works for treating ore. In fact, any largely operated mine does require such space, if not more. The land so needed is strictly within the intent of the law; and though no mill may be erected or contemplated, such area of surface is styled a mill site.

The land taken under this clause must be:

1. Non-mineral.
2. Non-contiguous to the lode.
3. Used or occupied by the owner for mining or milling purposes.—*13 L. D. 175; 32 Id. 128; 34 Id. 325.*

1. Non-Mineral.

The test on this point, following analogous rulings between agricultural and mining claims, would be: has the land greater value for its mineral, or for surface use in connection with the mine?—*13 L. D. 86; 517.*

The form of proof of such non-mineral character is by the affidavits of disinterested witnesses.

2. Non-Contiguous.

The mill site must be non-contiguous to the lode. *32 L. D. 128;* and a location made since January 1, 1904, must be situate some distance, and its boundaries be wholly distinct, from the lines of a lode location.—*34 L. D. 320.*

3. What Is Sufficient Use.

The building on the land of a pumping plant to carry water to the mine is a sufficient mining use.—*11 L. D. 338.* Or storing water on the same for the mine.—*13 Id. 175.* Use for storing ores or for tailings, shops or houses for workmen.—*5 Id. 192.* Or for houses for workmen on the mill.—*14 Id. 173.*

The use of a cabin on the land for storing tools was held sufficient in *Hartman v. Smith, 14 P. 648.* This case practically decides that the ordinary use of a prospector's cabin, wherever it may be located, if not on ground contiguous to the lode, is enough to justify the claiming of the site of the same as a mill site. Cited and followed in *Valcalda v. Silver Peak Mines, 86 F. 90.*

Insufficient Use.

The mill site section cannot be availed of to patent water rights proper.—*6 L. D. 706; 9 Id. 201; 12 Id. 624.* Or for the benefit of a third party.—*11 Id. 561.* The benefit must be to the particular lode in question.—*10 Id. 196.*

A lode owner has no right to attach to his patent application, at the request of a third party, an

independent piece of ground as a mill site.—*Hamburg Co. v. Stephenson, 30 P. 1088.*

Land for its timber cannot be located as a mill site, though the timber be used and needed at the mine.—*7 L. D. 557.* Timber has always been considered as a mining necessity, and the taking of it for such purpose clearly puts the land to a mining use.—*Tartar v. Spring Creek Co. 14 M. R. 371; Id. 388, note 9.* But the Land Office rulings have always been to the contrary.

A boarding house, store, saw-mill and wharf held insufficient mining use, where a group of mill sites was attempted to be patented with a group of lodes. —*32 L. D. 128.*

Second Class—Mill or Reduction Works.

Under this class, where the application is for the mill site alone, there must be a mill or reduction works—incidental uses are not sufficient. That the site contains a dam, penstock and pipes for driving works at neighboring mine will not answer.—*9 L. D. 460; 29 Id. 143.* And a patent will not issue to give additional ground to a mill site already patented.—*12 Id. 75.* Nor on two adjoining mill sites with improvements on the line between them.—*14 Id. 11.* It will not be allowed on the strength of carrying water to a smelter on other ground.—*5 Id. 190.*

Separate Application for Mill Site.

It has been ruled that where a lode has gone to patent the owner may afterwards by separate application obtain a patent on a mill site used in connection with the lode, and that such application need not show an actual mill on the ground. Such mill site is allowed to go to patent on the theory that every lode is entitled to a mill site, and it is a matter of indifference to the department whether the owner applies for the patent on lode and mill site together or separately.—*22 L. D. 496; L. O. Reg. 62.* A separate mill site for each lode in a group was disallowed in *32 L. D. 128.* Where more than one mill

site is applied for, reason for its necessity must be shown.—*34 L. D. 325.*

The $500 Improvements on the Lode are sufficient to enter both lode and mill site, if the mill site is used or occupied by the applicant for mining or milling purposes.—*8 L. D. 195.*

Proof of Improvements.

The early practice of the Land Office was to patent a mill site when applied for in connection with a lode, without proof of either use or improvements. This practice was taken advantage of to patent building lots, and all sorts of claims as mill sites, but the department now requires proof not only that it is non-mineral land, but that it is used for milling purposes or in connection with the mine—instances of such use being above given.

This proof of the use of the site in connection with the mine is by affidavit of the applicant and of two disinterested witnesses. Intention to use is not sufficient.—*14 L. D. 544.*

Adverse and Protest.

When a mill site application conflicts with a prior claim of another to the ground for like purposes it may be adversed; or it may adverse or be adversed by a lode or placer.—*1 L. D. 566; Rev. Ed. 555.* Where in conflict with a mineral claim it may be defeated by a protest and proof of being located on mineral land.—*4 L. O. 3; 5 Id. 51.* But see further on this point under ADVERSE CLAIM, post p. 477.

SEVERANCE.

Separation of Surface and Mineral Estate.

The ownership of the minerals may be vested in one, while the ownership of the surface is in another. This severance is often created by deed, in which case it amounts practically to a partition on a

horizontal plane, the two estates being entirely separated, except that from the nature of the case, the surface owner can usually claim the right of support, while the mine owner can claim such incidental use of the surface as is necessary to enable him to win the minerals.—*Caldwell v. Fulton, 3 M. R. 238; 31 Pa. 475; Horner v. Watson, 14 M. R. 1; 79 Pa. 242; Marvin v. Brewster Co. 13 M. R. 40; 55 N. Y. 538.*

When minerals are so severed they form a separate part of the freehold and the estate is not a mere easement.—*Bonson v. Jones, 56 N. W. 515; McConnell v. Pierce, 71 N. E. 522; Plummer v. Hillside Co. 104 F. 208.* The right of entry on surface cannot be enlarged so as to allow the erection of coke ovens—and its use for powder house, blacksmith shop and supply stores depends upon the circumstances of the case as found by the jury.—*Williams v. Gibson, 16 M. R. 243; 4 So. 350.* The mine owner may erect hoisting plant.—*Wardell v. Watson, 5 S. W. 605.*

The owner of the coal bed has the right to remove as much of the overlying stratum as is necessary to work the coal, and the right to use the space to carry foreign coal by instroke—but the ownership ceases upon exhaustion of the coal.—*Moore v. Indian Camp Co. 80 N. E. 6.*

If the surface owner take the minerals he is a trespasser.—*Ashman v. Wigton, 12 Atl. 74.*

Where there has been a severance of the surface from the minerals there is no privity between the estates.—*Hutchinson v. Kline, 49 Atl. 312;* and their owners are not tenants in common.—*Virginia Co. v. Kelly, 24 S. E. 1021.*

Parol evidence is not admissible that a deed of all coal under certain lines was intended to be limited to one particular vein.—*King v. New York Co. 54 Atl. 477.*

Mining Under Improvements.

By statute in Colorado (*R. S. Sec. 4213, 4217*) the mine owner is bound to secure the owner of the surface improvements if he attempt to mine under

any such improvements. Such statutes are no great departure from the common law which compels each estate to be enjoyed with proper regard to the rights of the sub-owner or superficial owner as the case may be, and would enjoin mining under valuable improvements if irreparable injury were threatened by such mining.

Surface Support.

Where the estates are severed the surface owner has the absolute right to vertical support.—*Youghiogheny Co. v. Hopkins, 21 M. R. 188; 48 Atl. 19.* And the rulings have upheld this right to extreme lengths. A lease to mine "all the coal" does not give the right to deprive the surface of support.—*Mickle v. Douglass, 17 M. R. 137; 39 N. W. 198.* But the surface owner is not entitled to lateral support.—*Matulys v. Philadelphia Co. 21 M. R. 745; 50 Atl. 823.*

Instances of Severance.

The surface and the subjacent strata are rarely owned by separate parties on the western slope except where placer gold or lodes have been discovered in towns before entry under the Town Site Acts; or in instances where conflicting claims have been compromised by deed, one party taking the surface and improvements, the other the veins underneath.

But the subject is important in the Western States chiefly with reference to the question of whether claims located on government land and claims patented by the government take both surface and minerals in all cases, or whether in any case there is an actual or implied severance of the minerals from the surface, either from the nature of the claim or from the language of patents confirming the claim.

Patented Claims Generally.

As to patented claims it has been the policy of the government to grant the entire estate, and retain no interest with the patentee. It has been so held in the case of a Mexican grant confirmed by patent, al-

though under the original grant the claimant had received no title to the mines of gold and silver from the Mexican government. It was considered that the confirmatory patent of the United States conveyed the soil, and everything under the soil, and that if the government had intended to reserve the royal metals, as the Mexican Republic had done, it should have been so expressly stated in the patent.—*Moore v. Smaw, 12 M. R. 418.*

In Patents to Lode Claims Both Surface and minerals are conveyed in terms.

Placer Claim Patents Convey not only the placer deposits and the surface, but also all veins except those known to exist when the application for patent was filed, which are expressly excepted.

As to Mill Site Patents It Is Required That such claims be located on non-mineral land.

But aside from the clause referring to the rights of the proprietors of lodes dipping underneath, which is common to all classes of patents, they seem to be a general grant of the land which they enclose, which grant would cover all lodes and mineral rights.

A valid lode claim overlying the ground could have protected its rights by an adverse; and not only do the general rules of construction favor the proposition that a mill site patent conveys all lodes and deposits found within its lines, but the government having undertaken to decide the mineral or non-mineral character of the ground before the patent issues and thereupon to issue an absolute grant, such grant carries both the soil and what is under the soil. Or if the grant is not considered absolute, owing to the reservation of lodes which penetrate the lines of the mill site on the strike, which has been sometimes inserted, such reservation is one forced into the paper without legal authority, and is therefore void.—*See Davis v. Weibbold, 139 U. S. 507; Gale v. Best, 78 Cal. 235.*

As to Patented Agricultural Claims Obtained in good faith, not at the time of entry known to be mineral land, minerals afterwards discovered certainly belong to the patentee; but where land has been entered as agricultural upon which mineral locations existed, in defiance of the rights of mineral claimants, such patents could be set aside as against the mineral claimants and it was *held* in the case of *Gold Hill Co. v. Ish, 5 Or. 104; 11 M. R. 635*, that such a patent was absolutely void as to the land covered by the mining claim.

A patent, however, howsoever procured, usually operates to pass title, and in such cases the holder should be declared a trustee for the use of the owner of the mine.—*Salmon v. Symonds, 30 Cal. 302.* *See page 144.*

Lodes Dipping Under Patents.

It may as well be observed under this head that all patents, agricultural as well as mineral, are supposed to contain a reservation of the right of lodes apexing outside their bounds, to dip underneath their lines. *See page 176.*

The authority to insert this clause in agricultural patents is doubted in *Patterson v. Ogden, 71 P. 443.*

School Lands.

Section 16 of each township, if non-mineral, since the organization of the Federal Government, and in later years, Section 36, and in some States additional sections, have been reserved from sale and granted to the respective States upon their admission, such sections in the Territories being held by the government by an implied trust to that effect.—*8 L. D. 495.* The words of grant to the several States are not uniform but in general the title passes upon approval of the survey.—*7 L. D. 459; 9 Id. 408; Cooper v. Roberts, 18 How. 173.*

In the meantime before State admission and until survey they are open to discovery of mineral and

location of mineral claims upon them the same as upon the rest of the public domain.

When the mineral character of such reserved sections was known before survey the title to no part of the same passes to the State, and claims may be located upon them.—*5 L. O. 178; Heydenfeldt v. Daney Co. 93 U. S. 634; 13 M. R. 204; Ivanhoe Co. v. Keystone Co. 13 M. R. 214; 102 U. S. 167.*

But where their mineral character has been discovered since they were surveyed, such subsequent discovery of mineral will not divest the title which has already passed.—*7 L. D. 459; 9 Id. 408.* And the States have control of their sale and disposal. Before admission as a State, a Territory has not such control.—*4 L. D. 390.*

By Act of Congress approved April 2, 1884 (*Sup. p. 424*), Colorado is reimbursed for school sections lost to the state by reason of their mineral character, and similar Acts apply to other States. Locations may be made on indemnity sections until approval.—*27 L. D. 411; 29 L. D. 181.*

Where lands are mineral at date of the reservation they do not pass to the State upon the subsequent abandonment of the mines.—*Hermocilla v. Hubbell, 26 P. 611.*

The determination of non-mineral character by the Land Office is not subject to collateral attack.—*Saunders v. La Purisima Co. 57 P. 656.*

Patented Town Sites.

In this case there is an express severance of the minerals. The holder of the lot takes no title to any located claims. The lot is subject to entry to get the mines of gold or silver which it may contain.—R. S. § 2386, 2392.

These sections are supplemented, if not supplied by an Act approved March 3, 1891, as follows:

Reservation of Mineral Rights From Town Sites.

Sec. 16.—That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or

lead, or to any valid mining claim or possession held under existing law.

When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto:

Provided, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.—*Sup. p. 945.*

A townsite entry under the above act must conform to legal subdivision when made upon surveyed lands, as required by R. S. Sec. 2389.—*33 L. D. 542.*

The town patent, where valid mining locations have been made within its limits, does not grant the minerals.—*Moyle v. Bullene, 44 P. 69; 26 L. D. 144; 29 L. D. 89.;* nor where the land was known to be mineral at time of entry.—*29 L. D. 426; 31 Id. 88.* Under the terms of the second paragraph of the present Act, it seems clear that lode or placer patents can issue for such claims within the town limits.—*25 L. D. 518; 34 Id. 102, 276.* If the mine was located after the occupation of the surface by the lot owner, but before the entry of the town site for patent, the mines and surface are then separate estates, each to be enjoyed under the various applications of the maxim: *sic utere tuo ut alienum non laedas.—Smoke House Lode Case, 12 P. 858; King v. Thomas, Id. 865; Deffeback v. Hawke, 115 U. S. 392.*

Under the various reservations in favor of mines out of town site patents, under the Acts in force before 1891, it has been decided that discovery of mineral after the patent issues is of no avail.—*Tombstone T. S. Cases, 15 P. 26; Larned v. Jenkins, 113 F. 634.* That a location not valid on account of indefinite description is not excluded.—*Blackmore v. Reilly, 17 P. 72.* Nor a location without a discovery.—*Regan v. Whittaker, 85 N. W. 863.* That only

the lode, and not its surface, is excepted, at least under patents prior to 1872.—*Dower v. Richards, 73 Cal. 477.* That the mine must have been a known valuable and subsisting claim.—*Smith v. Hill, 26 P. 644; Davis v. Weibbold, 139 U. S. 507.* In the last case it was also held that a reservation in a mining patent in favor of a lot claimant was a nullity because unauthorized. A lode once profitably worked and then abandoned is not excepted, though after the town site patent issues the lode is found to be still valuable.—*Dower v. Richards, 151 U. S. 658.*

The rights of the mine owner may be lost by laches or neglect to keep up the annual labor.—*Horsky v. Moran, 53 P. 1064; Callahan v. James, 71 P. 104.*

A town site patent under R. S. § 2392 issued in 1877 did not convey title to any valid claim. The distinction that it must be a mine of value does not apply to patents under that Act.—*Callahan v. James, 74 P. 853.*

Doubtful Policy of General Reservations.

Out of these attempted reservations of known lodes, mines, or minerals, by general terms under the Acts providing for the patenting of different classes of land, only trouble, uncertainty and litigation ensue; the holdings, therefore, are usuallly strictly against them. And yet the fault is with the government attempting to protect such rights by sweeping clauses instead of allowing them to adverse or to come in as co-applicants—the mines become abandoned and the lot owner claims the whole estate, or they become of sudden value, tempting the miner to assert more than his rights. The same observations apply with greater force to the reservation of known lodes out of placers. The result in either case is that the surface is disposed of, while the legal title to the minerals remains in the United States. The present practice is to allow an overlapping patent to the mineral claimant under certain conditions.—*25 L. D. 518; 29 Id. 89; 426.* Before the decision in the *South Star case, cited p. 226*, the de-

partment had required the surface patent to be set aside before they would take action.—*Pike's Peak Lode, 10 L. D. 200; Protector Lode, 12 L. D. 662.*

Unpatented Claims.

A lode claim covers the entire surface as well as the veins within it. Before the passage of the Mining Acts, it had been held *(Brown v. 49 Co. 9 M. R. 600)* that a lode location also included float gold below its apex, which had evidently come from that particular vein. It is evident, from the Congressional grant of the surface without excepting any form of deposit, that a lode location made in good faith upon an ore-producing vein, without the aid of any such decision, would include placer deposits within its lines both above and below the vein.

But an unpatented placer claim covers no lodes, and a lode claim may be located across it. If the holder of such claim discover mineral upon it he should stake and record the same, as a lode claim, and he has the same right as a stranger so to do, if he be the first to disclose such mineral value.—*McCarthy v. Speed, 77 N. W. 590.* An unpatented town site or ranch claim, does not include either veins or deposits of gold or silver.

Where land has been returned as agricultural the discovery and formal location of a lode or placer deposit over the same, shifts the presumption to one in favor of the mineral claimant.—*21 L. D. 502.*

STATE LANDS.

In Nevada and Wyoming the State Lands are by statute open to prospectors. The State Patent does not pass mines claimed under the Act.—*Stanley v. Mineral Union, 63 P. 59; 26 Nev. 55.*

By Colorado Act of 1905 (R. S. § 5215) prospectors discovering mineral on State Lands are allowed to pre-empt a claim 1,500 by 300 feet whether lode

or placer and ultimately to obtain the State's Title to the same at a minimum price of $10 per acre.

LOCATION NOTICE ON STATE LAND.

I claim the *Admiral* lode (or placer) discovered by me on State land, 1,500 by 300 feet, 750 feet easterly and 750 feet westerly from this point, as staked on the ground this 14th day of July, 1907.

LOUIS M. PETITDIDIER.

The above notice holds the claim for 90 days during which time the discoverer must do $100 assessment work and stake the claim and file a Location Certificate with the State Board of Land Commissioners and within one year must apply to the Board for either Lease or Deed. The forms on pp. 75 and 218 will suffice for Location Certificates and no record at all is required in the County Recorder's office.

TUNNEL SITES.

Line of Tunnel—Neglect to Work for Six Months.

R. S. Sec. 2323.—Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.—*Sec. 4, A. C. May 10, 1872.*

Record.

R. S. Colo. Sec. 4207.—If any person or persons shall locate a tunnel claim for the purpose of discovery, he shall record the same, specifying the place of commencement and termination thereof, with the names of the parties interested therein.—*Nov. 7, 1861.*

Line of Tunnel.

Immediately upon the passage of the mining Act of 1872, containing the tunnel section above printed, controversy arose as to what was meant by the words "the line thereof."

The Land Office shortly published their construction that it meant "the width thereof and no more." This construction was adopted in the case of *Corning Tunnel Co. v. Pell, 14 M. R. 612; 4 Colo. 507.* This became the generally received interpretation of the act until the case of *Enterprise Co. v. Rico Aspen Co. 66 F. 200*, affirmed by the National Supreme Court in 1897, *167 U. S. 108;* followed by the case of *Campbell v. Ellet, 167 U. S. 116*, affirming *18 Colo. 511.*

The court holds that a tunnel duly located and its work diligently prosecuted has the right to all lodes not previously known to exist, on either side of the bore. That is to say, when a lode is reached the tunnel may elect to take 1,500 feet in one direction or 1,500 feet on the other side or may divide the length, so much on either side. That all locations on lodes not previously known, made within such area are voidable at the election of the owner of the tunnel.

Location and Record of Tunnel Site.

The following form has been drawn in attempted compliance with the Act of Congress, the Land Office regulations and the construction given to the act by the *Rico-Aspen case.*

It purports to claim its entire frontage of 3,000 feet as its line of tunnel, and if the *Rico-Aspen case* stands in its entirety, the claimant is in position to assert his full rights under such form. But the *Rico-Aspen case* in principle cannot be reconciled with the *Erhardt-Boaro case, 15 M. R. 472; 113 U. S. 527.* There the prospector by his notice had an inchoate right to his lode just discovered; such notice not specifying the extent of his claim, he was limited in his right of selection to 750 feet on each side of his point of

discovery. This discord as to the two classes of claims still existing, we advise that it is safer for the tunnel claimant to elect at the outstart to take 750 feet on each side, or some other definite number of feet on each side, of the bore of his proposed tunnel.

LOCATION CERTIFICATE OF TUNNEL.

TO ALL WHOM THESE PRESENTS MAY CONCERN: Know ye, that I, *W. E. Renshaw*, a citizen of the United States, of *Idaho Springs*, County of *Clear Creek*, State of *Colorado*, do hereby declare and publish as a legal notice to all the world that I have a valid right to the occupancy, possession and enjoyment of THE HALL TUNNEL AND TUNNEL SITE, located *January 22nd*, A. D. *1908*, for the discovery of mines and the development of lodes, and situate in *Griffith* Mining District, *Clear Creek* County, State of Colorado, described as follows, to wit:

Mouth of tunnel situate *on north slope of Leavenworth mountain; from the mouth of the tunnel, culvert under the middle track of the Georgetown, Breckenridge & Leadville Railroad bears N. 17° 38' W. 32 feet; corner No. 6 survey lot No. 461½-B. Lion mill site bears N. 73° 45' W. 100.7 feet; Woodchuck rock bears N. 50° 45' E.; Sherman mountain bears N. 72° 55' W.*

Size of tunnel *8 feet wide by 7 feet high in the clear.*

Course of tunnel from its mouth *S. 17° 38' E. 3,000 feet to the south end of said tunnel, at which point is set a substantial stake, being the end stake, and between tunnel mouth and end stake the center line of the tunnel is marked at 500 feet, 1,200 feet, 1,900 feet and 2,528 feet from the mouth by marked stakes or blazed and marked trees. From the end stake Republican mountain bears N. 40° W.; Saxon mountain bears N. 39° 40' E.; a stump 9 inches in diameter marked "B. T. & H. T." bears S. 86° 15' W. 18.4 feet; a tree 5 inches in diameter marked "H. T. & B. T." bears N. 43° W. 2 feet; from said end stake, set a stake N. 72° 22' E. 1,500 feet; from said end stake set a stake S. 72° 22' W. 1,500 feet; from mouth of tunnel set a stake N. 72° 22' E. 1,500 feet; from mouth of tunnel set a stake S. 72° 22' W. 1,500 feet;* which last four mentioned stakes are at the exterior corners of the claim of said tunnel site.

And I claim for line of tunnel 1,500 feet on each side of the center of the bore or course of the tunnel, and the right to 1,500 feet on each and every lode which may be discovered in the due prosecution of said tunnel.*

Together with all and singular the heriditaments and appurtenances thereunto belonging or in anywise appertaining, and all rights granted to the locator as tunnel rights under the terms of section 2323 of the Revised Statutes of the United States.

Witness my hand and seal this *22nd* day of *January*, A. D. *1908*. W. E. RENSHAW. [SEAL.]

STATE OF COLORADO, City and County of *Denver:* ss.

Before me, the subscriber, a notary public in and for said county, personally appeared *W. E. Renshaw,* to me personally known to be the same person described in and who executed the within declaration of occupation and acknowledged that he signed, sealed and published the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal this *22nd* day of *January,* A. D. *1908.* *Arthur R. Morrison,*
[SEAL.] Notary Public.

STATE OF COLORADO, City and County of *Denver:* ss.

W. E. Renshaw, of the County of *Clear Creek,* State of Colorado, being first duly sworn according to law deposes and says: That he is a citizen of the United States over the age of 21 years; that he is the owner by pre-emption, location and occupation of the foregoing tunnel site, the said tunnel being prosecuted for the development of lodes belonging to said affiant; also for the discovery of other lodes; affiant further says that he has expended in actual work and improvements on said tunnel not less than forty thousand dollars, and that said tunnel has been already run the distance of 1,000 feet, and that it is *bona fide* his intention to prosecute work on said tunnel so located and described with reasonable diligence for the purposes therein set forth. W. E. RENSHAW.

Subscribed and sworn to before me this *22nd* day of *January,* A. D. *1908.* *Arthur R. Morrison,*
[SEAL.] Notary Public.

Before recording place at the mouth of tunnel the

LOCATION NOTICE.

The Hall Tunnel and Tunnel Site, located this *January 22nd, 1908,* by *W. E. Renshaw.* Course S. 17° 38′ E. 3,000 feet to end post, from which end post Republican mountain bears N. 40° W., Saxon mountain bears N. 39° 40′ E., stump 9 inches diameter marked "B. T. & H. T." bears S. 86° 15′ W. 18.4 feet.

Height of tunnel 7 feet, width 8 feet.

I claim 1,500 feet on all lodes to be discovered in this tunnel and not previously known to exist, on either side of tunnel as staked on the ground.*

W. E. RENSHAW.

DUMP LOCATION.

If ground for a dump is claimed, add, in the location certificate after the*:

"I also claim a square tract of land 125 feet on each side of the mouth of tunnel and extending 250 feet immediately below the mouth of the tunnel, as staked upon the ground, for dumping purposes."

And to the notice after the* add:

"Dump 250 feet square as staked."

The actual location, of course, consists in setting the stakes as called for in such notices, and in the starting the tunnel in good faith.

Location of Lodes Cut in a Tunnel.

They should be staked and recorded exactly as in the case of lodes discovered at the surface, except that no discovery shaft is required—the discovery in the tunnel taking its place—and the location stake or notice should be set on the surface at a point midway between side lines and above the discovery in the tunnel. Such location notice, as well as the location certificate, should state the fact that the lode was discovered in the tunnel and the number of feet in from the mouth. In fixing the surface line, approximate calculations should be made for the dip. In *Ellet v. Campbell, 18 Colo. 510,* affirmed *167 U. S. 116,* it was held that the discovery need not be followed by location; but the U. S. Supreme Court conceded that it might be required before patent could be secured.

"A Tunnel is not a Mining Claim although it has sometimes been inaccurately called one."—*Creede Co. v. Uinta Co. 196 U. S. 337.* In that case it is expressly held that the Tunnel is a means of exploration "In the hope of finding a mineral vein. When one is found he (the tunnel owner) is called upon to make a location of the ground containing that vein and thus creates a mining claim the protection of which may require adverse proceedings."

We never could conceive that, as might be inferred from the *Ellet case,* a discovery in a tunnel would hold indefinitely without defining the surface lines of the claim and the ruling above cited from the *Creede Case* by the National Supreme Court sets the matter at rest.

Under this decision as we understand it the discoverer by tunnel has no greater rights than one who finds the lode on the surface and after dis-

covery so made has no greater time than any other discoverer to fix the length, width and surface lines which he will choose to enclose and protect his discovery.

In *Brewster v. Shoemaker, 63 P. 309*, the lode was cut 250 feet below the surface in an unrecorded cross-cut. The dip was calculated to the surface and discovery notice posted on the center line, referring to the discovery in the tunnel and the claim was staked and recorded. Held that the location was valid and that no proving up between surface and the tunnel was required. The case holds also that the fact that the tunnel had been driven across patented ground belonging to strangers was not a point which could be raised by third parties.

The Right to Penetrate Under Other Lands.

The trespass of a tunnel cutting through country rock across a claim at great depth is not of that class denominated as destructive or irreparable, but it opens a private back door to the miner's underground wealth, and it may be enjoined because its completion would ultimately ripen into an easement. *Richards v. Dower, 64 Cal. 62;* or if it claims the right to take the ore.—*Stratton v. Gold Sov. Co. 1 Mills' Leg. Adv. 350.*

Applying the theory that every surface claimant owns to the center of the earth, no man has a right to drive a tunnel underneath the property of another without his license or consent. Such right may exist by district rule *(Bliss v. Kingdom, 41 Cal. 651)*, but without any specific rule tunnels were constantly driven across prior claims without much question, until the Rico-Aspen decision and its sweeping concessions to tunnel sites compelled miners in self defense to check their encroachments. The decisions are uniform that in the absence of statute or district rule, a tunnel has no implied right or license to penetrate under prior patents or locations. —*Richards v. Dower, 64 Cal. 62; 73 Cal. 477; Amador Co. v. Dewitt, 73 Cal. 482; Calhoun Co. v. Ajax Co. 182 U. S. 499.*

A party has no right to tunnel through another's patented ground to cut a vein whose apex is within his own patented lines.—*St. Louis Co. v. Montana Co. 113 F. 900.*

The Colorado Tunnel Acts—Eminent Domain.

A Colorado act of 1861 gave a discovery tunnel the "right of way through all lodes which may lie on its course." The act of 1897 enlarged this permission, and further provided for right of inspection to the owner whose lode was cut, and placed the burden of proof on the question of lode identity on the tunnel. Both these acts, in *Cone v. Roxanna Co.* (HALLETT, J. MS.), were held void (1) as to tunnel crossing prior location, because no provision was made for compensation, and (2) because not within the terms of A. C. Sec. *2338*, allowing the states to legislate concerning easements. This same point (2) was ruled in *Calhoun Co. v. Ajax Co. 59 P. 617 (affd. 182 U. S. 509)*, the case making no reference to the 1897 act, but its tenor would be against the validity of the act as a license to penetrate either a prior or a later claim.

The Colorado act of 1891 (R. S. § 2461) giving tunnels the right to condemn a right of way was sustained in *Tanner v. Treasury Co. 83 P. 464*, so there can be no doubt of the validity of the later and more specific act of 1907 (R. S. § 2435). The Idaho act on the same subject was held valid in *Baillie v. Larson, 138 F. 177.*

By the Colorado act of 1907 power is given to condemn a right of way to any tunnel company offering itself as a common carrier of ores. It must file with the county recorder a map of its survey, allow inspection to owners of all veins which it cuts, and transport their ore and waste at fixed charges.

Where the tunnel has already been driven through the claim, it seems that ejectment is the proper remedy, and not injunction.—*Creede Co. v. Uinta Co.* HALLETT, J. MS.

Unrecorded Tunnels.

Any party running a tunnel would probably hold the tunnel itself *(i. e.* the bore as far as actually run), without any record whatever.—*8 L. O. 71.* This is done every day in the case of cross-cuts, which are simply tunnels on a small scale. But to claim any rights for its line or otherwise under the Act of Congress it must be staked and recorded.

Of course, a lode discovered in a tunnel, after the lode has been duly located and recorded on the tunnel discovery is as valid upon an unrecorded as upon a recorded tunnel, its title having by such independent location become a matter wholly apart from the tunnel location.

Failure to Work.

The right to blind lodes is conditioned upon prosecuting work with "reasonable diligence." In the *Rico-Aspen case, 66 F. 206,* the court intimates that this clause should receive a strict construction, and that prompt and energetic prosecution of the work should be required.

Failure to work for six months deprives the Tunnel Site of its claim to blind lodes, but does not affect its right to continue its bore through claims in advance of it.—*Fissure Co. v. Old Susan Co. 63 P. 587.*

Abandonment.

A tunnel may, like any other kind of claim, be abandoned; but neglect to work does not operate to effect an abandonment; such neglect only operates to deprive it of tunnel rights along its line. The fact that no labor has been done for many years is evidence of abandonment, but not conclusive. As before stated (*page 90*) abandonment is a question of fact, and in the case of tunnels is wholly independent of the annual labor.

Patent—Adverse Claim.

There is no provision for patenting a tunnel site. Nor does it need to protect itself by adverse against

an application for patent on a survey across its line in advance of its breast. If such Survey cover blind lodes not yet cut in the tunnel the tunnel rights to the same are saved under the ruling in the *Rico-Aspen case.* And as to its right to bore through such patented Survey its easement is saved without necessity of adverse or suit under the authoritative decision in *Creede Co. v. Uinta Co. supra.*

A lode recorded on a Tunnel Discovery adverses of course on its own merits as a lode location, but its discovery would on proper facts relate back to the date of the location of the Tunnel Site.

But in *29 L. D. 235,* a tunnel having adversed a lode application, the application was held stayed until the determination of the supporting suit: and the case suggests the necessity of an adverse claim to protect its dump ground, if surveyed in.

Annual Labor by Tunnel.

Sec. 1.—That section two thousand three hundred and twenty-four of the Revised Statutes, be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.—*Feb. 11, 1875, Sup. p. 62.*

The annual labor of $100 on each claim may be performed under the above section by work done on a tunnel, cutting, or which is driven to cut, such claims.—*5 L. O. 5; Id. 34; 17 L. D. 190.*

To apply tunnel work it is no objection that the tunnel runs through vacant ground or crosses lodes belonging to others before it reaches a point where it would tend to develop the claim.—*Hain v. Mattes, 34 Colo. 345; 83 P. 127.*

The Patent Expenditures of $500 may also be made on such tunnel.—*4 L. O. 67.* A party may patent one lode on the line of his tunnel for each $500

of labor spent in driving the tunnel.—*30 L. D. 510.* All claims in a group must share equally in the expenditure on the tunnel.—*35 L. D. 361.*

Tunnels Over 3,000 Feet Long.

The A. C. expressly limits the claim of a tunnel site to lodes not known to exist "within three thousand feet from the face of such tunnel." Attempts have been made to evade this limitation by filing records of a second tunnel to begin at a point 3,000 feet in from the mouth of the tunnel projected from the surface; i. e., to begin at the end of the first 3,000 feet, taking 3,000 feet more and even third and fourth extensions have been so recorded.

We regard these locations as absolutely void. But we draw the distinction between the right of a tunnel to undiscovered lodes and its right to bore through the mountain. The former is granted by Act of Congress, is limited by its terms and cannot be enlarged. The latter, the right to bore, is a mere easement, exercised under district rules before the Act, and there is no limitation on the claim of a tunnel to drive itself through the public domain as far as its owners may desire to penetrate.

A tunnel in its record therefore, in our opinion, can claim a right of way to drive to any expressed number of feet, but it cannot claim the statutory tunnel right to blind lodes beyond the first 3,000 feet; and the location of a second tunnel from the breast of the first is an attempt by a self-serving act to take from the prospector's rights in the ground beyond 3,000 feet a valuable privilege, which the Act of Congress has given him.

TAXATION.

By the Colorado Revenue Act, R. S. Sec. 5575, mining claims are required to be listed by the name, and number of Survey Lot, when patented or entered for patent.

Mines are divided into two classes—producing and non-producing. A gross output of $5,000 places

the mine in the first class, and it is to be assessed at one-fourth of its gross output. If the net output shows a profit of more than a fourth, such net output is to be the valuation. Non-producing mines are to be assessed like other real estate, at their supposed actual value. Special provisions are made for taxation of group claims and tunnel sites.

The owner is required to make return showing the tonnage, freight and mill returns, as stated in detail in the Act. §§ 5617, 5627.

For construction of similar act of 1887 see *Pilgrim Co. v. Teller County, 76 P. 364.*

Possessory Title Taxable.

The estate in unpatented mining claims is property subject to the right of taxation.—*Forbes v. Gracey, 94 U. S. 762; 14 M. R. 183; Seymour v. Fisher, 16 Colo. 188.* Notwithstanding the above declaration of taxable *status* the possessory title has not, as a rule, been assessed, though taxes have always been levied on the surface improvements when extensive.

Patented Claims, or those entered for patent, are of course assessed and taxed as other classes of real estate. In Nevada, and other states, attempts, attended with continued litigation, have been made to tax the net output. Such tax, so plausible in theory, is unjust and grossly unequal after conceding the fact that absolutely equal taxation cannot be realized upon any theory of assessment. See *Mercur Co. v. Spry, 52 P. 382,* construing the Utah law of this character. Net proceeds of coal mines held taxable in Montana.—*Montana Co. v. Livingston, 52 P. 780.*

Special Instances.

A mine cannot be sold for tax assessed against improvements not found on the mining ground.—*Knox v. Higby, 18 P. 381.*

Exemption as mining claim ceases when placer ground is laid out into town lots.—*Dyke v. Whyte, 29 P. 128.*

Where surface and minerals are separately owned they may be separately taxed.—*Cons. Coal*

Co. v. Baker, 26 N. E. 651; Stuart v. Com. 23 S. W. 367.

The number of the Survey Lot, in Colorado, is an essential part of the description in a Tax deed.—*Hammon v. Nix, 104 F. 689.*

LIENS, JUDGMENTS, MORTGAGES.

How Affected by Patent.

R. S. Sec. 2332.— * * * Nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent.—*Sec. 13, A. C. July 9, 1870.*

Patent, although relieving claims from adverse rights, does not relieve from liens already attached against the property. On the other hand, the patented title enures to the benefit of the lien holder.—*Butte Co. v. Frank, 65 P. 1.*

Judgments are liens for the period limited by statute in each State, usually six years, the time running either from the date of judgment or the date of filing the transcript in the Recorder's office.

A mortgage may be so drawn as to secure expenses of mining as well as the original debt.—*Charter Oak Co. v. Stephens, 15 P. 253.* In exceptional instances a miner's lien has been held to cut out a prior mortgage. *Atlantic Co. v. Ropes Co. 77 N. W. 938; Galloway v. Blue Spgs. Co. 37 S. W. 1016,* but as a general rule the mortgage takes precedence of all debts incurred by the further working of the mine. The lien of neither mortgage, judgment nor attachment, prevents the operation of the mine without an injunction for the protection of the security—and such injunction will be granted only in exceptional instances.—*Vervalen v. Older, 8 N. J. Eq. 98; 10 M. R. 540; Chung Kee v. Davidson, 36 P. 519.* Such liens do not prevent the free severance and sale of the ore.—*Young v. Northern Co. 10 M. R. 596; 9 Biss.*

300. The debtor can continue to mine after sheriff's sale, during the redemption period.—*Ward v. Carp River Co. 15 N. W. 889.*

In *Macon v. Trowbridge, 87 P. 1147,* an action to foreclose a trust deed on a mine, defendant was allowed to offset damages for failure of the note holder to keep the covenants of a lease on the same mine.

By Section 1 of the chapter of the R. S. entitled "Trust Deeds and Mortgages," trust deeds in Colorado must run to the "Public Trustee," otherwise they can be foreclosed only as mortgages. Whatever form is followed the Statute allows nine months for redemption. The common law mortgage, both for security to the creditor and for fairness to the debtor, is to be preferred in all cases except in securing large bond issues where for reasons specially applying to the negotiation of the securities a trust company or some personal trustee other than the public trustee is usually nominated.

A mining partner in certain cases seems to have a lien for his advances in excess of those of a co-partner.—*Duryea v. Burt, 11 M. R. 395; 28 Cal. 599; Beck v. O'Connor, 53 P. 94; Childers v. Neely, 34 S. E. 828; G. V. B. Co. v. Bank, 95 F. 35.*

See MINERS' LIEN; EXAMINATION OF TITLE.

MINERS' LIEN.

To Whom Allowed by Colorado Act.

R. S. Sec. 4028.—The provisions of this Act shall apply to all persons who shall do work or shall furnish materials or mining, milling or other machinery or other fixtures, as provided in Section 1 of this Act, for the working, preservation, prospecting or development of any mine, lode or mining claim or deposit yielding metals or minerals of any kind or for the working, preservation or development of any such mine, lode or deposit, * * *

Several Claims Worked Together.

Provided, That when two or more lodes, mines or deposits owned or claimed by the same person or persons

shall be worked through a common shaft, tunnel, incline, adit, drift or other excavation, then all the mines, mining claims, lodes, deposits and tunnel and mill sites so owned and worked or developed shall, for the purpose of this Act, be deemed one mine; * * *

Water Rights and Easements Included.

R. S. Sec. 4031.—Such liens shall likewise attach to rights of water and rights of way that may in any manner pertain to any kind of property hereinbefore specified and to which such liens attach. * * *

Oil Wells.

Section 4049 gives a lien for sinking an oil or gas well.

A miner whose wages or contract money is in default, secures a lien by filing with the County Recorder a statement substantially as follows:

FORM OF LIEN STATEMENT.

KNOW ALL MEN BY THESE PRESENTS: That I, *Max Dagenais*, do hereby give notice of my intention to hold and claim a lien upon the *Thomas a'Kempis* Lode Mining Claim in *Ruby* Mining District, County of *Gunnison*, State of Colorado.

Said lien is claimed for work and labor done by me upon said lode (*or materials furnished by me to said lode for the working and development of the same and used therein*), as miner for days pay, at the special instance and request of *J. G. Edwards*, one of the owners or reputed owners of said lode, between the first day of July, A. D. 1907, and the 25th day of December, A. D. 1907, both dates inclusive, upon the following abstract of indebtedness:

Total amount of indebtedness.....	$742.00
Total amount of credits.....	441.00
Balance due claimant.....	$301.00

That the owners or reputed owners of said lode are *Alva Adams* and *J. G. Edwards*.

Witness my hand this *second* day of *January*, A. D. *1908*.

MAX DAGENAIS,
Claimant.

STATE OF COLORADO, County of *Gunnison:* ss.

Before me, the subscriber, *Chas. E. Whitfield*, a Notary Public in and for said county, personally appeared *Max Dagenais*, who, being duly sworn, saith that the foregoing statement and abstract of indebtedness, and the mat-

ters and things therein set forth, are true to the best knowledge, information and belief of affiant.

MAX DAGENAIS.

Sworn and subscribed before me this *second* day of *January*, A. D. *1908*. *Chas. E. Whitfield*,
[SEAL.] Notary Public.

When the claimant is a sub-contractor or employed by a contractor, strike out

"J. G. Edwards, one of the owners or reputed owners of said lode,"

and insert

"at the special instance and request of *Thomas B. Crawford*, a contractor under the owners of said lode."

Sub-contractors must serve a copy of such statement on the owner or his agent, at or before the time of filing, but if neither the owner nor agent can be found in the County, an affidavit to that effect shall be filed in lieu of service.

The time to file varies from one to three months according to the class or nature of the claim.

Special provision is made in the Act for instances where the names of the owners are unknown.

Six Months to Sue.

An action must be commenced to enforce the lien within six months after work completed or the lien is lost.

Where mines are worked as a group the whole are considered as one mine for lien purposes.—*Tredinnick v. Red Cloud Co. 13 P. 152.*

General Statutory Legislation.

Miners' or mechanics' liens are pure creations of statute, but are allowed by specific legislation in all the States and Territories. They uniformly prescribe some such statement or notice equivalent to the above form, but the statute of the particular State must be looked to for details.

Decisions.

A miner has no lien upon the ore. For rule of distribution where work has been performed on

various parcels of group, *see Bassick Co. v. Schoolfield, 10 Colo. 46; Malone v. Big Flat Co. 18 P. 772.* Lien allowed for pumping and stoping.—*Chappius v. Blankman, 60 P. 926.*

A party engaged in hauling ore from the mines to the quartz mill has no lien on the mine.—*Barnard v. McKenzie, 4 Colo. 251; 9 M. R. 403.* Watchman not entitled to.—*Williams v. Hawley, 77 P. 762.*

A mining foreman or superintendent has a lien. —*Palmer v. Uncas Co. 70 Cal. 614; McLaren v. Byrnes, 45 N. W. 143. See Smallhouse v. Kentucky Co. 2 Mont. 443; 9 M. R. 388; Rara Avis Co. v. Bouscher, 9 Colo. 385.*

An expert has no lien for making a report on a mine.—*Lindemann v. Belden Co. 65 P. 403.*

A laborer working in a Quartz Mill standing on the claim held to have a lien on the entire mine.— *Thompson v. Wise Boy Co. 74 P. 958.* Lien for mill building extended to group of mines to operate which it was built.—*Salt Lake Co. v. Chainman Co. 137 F. 632.*

Lien of Surveyor or Civil Engineer.

Whether R. S. Colo § 4045 giving such lien is still in force is matter of doubt, but in any event a surveyor seems to be allowed a lien under the terms of the general causes of section 4025.

Mine Under Lease.

The title is never bound by lien for work done for a lessee unless by Statute expressly so providing. The Arizona Statute does not give a lien in such case.—*Griffin v. Hurley, 65 P. 147.*

All the decisions under the Colorado Acts purporting to give a lien against a mine worked under lease, have been against the validity of such lien.— *Wilkins v. Abell, 58 P. 612; Antlers Co. v. Cunningham, 68 P. 226; Williams v. El Dora Co. 83 P. 780.*

The language of the present Act, R. S. § 4028, a compromise between those favoring the lien and those opposed to it, is simply unintelligible;

but if there is any danger from that source it may be avoided by posting notice on the mine substantially in the following form:

NOTICE.

February 27, 1908.

Notice is hereby given to all persons performing labor or furnishing skill, materials, machinery or other fixtures, or supplies of any kind to or on the *Gen. Cronje* mine, upon which this notice is posted, that the undersigned, the owner of said mine, will not be responsible for any labor performed on, or any skill, materials, machinery, fixtures or supplies of any kind furnished to said mine, nor shall the interest of said owner be subject to any lien for the same. And all persons are hereby notified that the said mine and premises have been leased to *F. M. Roberts.*

HENRY I. SEEMANN.

By Option Holder.

When a mine is worked under an option of sale the terms of such contracts vary so widely that no general rule can be safely stated as to when liability attaches against the fee simple title. On a lease containing covenants for special work with privilege of purchase the owner's estate has been held liable in *Eaman v. Bashford, 37 P. 24; Hines v. Miller, 55 P. 401; Colo. I. Wks. v. Taylor, Id. 942; Hendrie Co. v. Holy Cross Co. 68 P. 785.* To the contrary.—*Maher v. Shull, 52 P. 1115; Block v. Murray, 31 P. 550; Hadley Co. v. Cummings, 64 P. 443; Reese v. Bald Mt. Co. 65 P. 578.*

The employe of a licensee has no lien.—*Jurgenson v. Diller, 46 P. 610.* Nor the employe of the claimant of a hostile title.—*Idaho Co. v. Winchell, 59 P. 533.*

Miner hired by party holding possession under executory contract of purchase has no lien.—*Williams v. Hawley, 77 P. 762.* But the real owner may be estopped where he allows the option holder to assert title.—*Eastwood v. Standard Co. (Ida.) 81 P. 382.*

CONVEYANCE.

The ordinary printed forms of deeds are usually sufficient to convey mining claims, but owing to the common practice of employing conveyancers totally disconnected with the legal profession, few abstracts, when the deeds, as recorded at length, are examined from the memoranda on the abstract, can show an unbroken line of perfect conveyances.

A common imposition is to present a deed in the form of a warranty purporting to convey "all the *right*, *title* and *interest* of the party of the first part," which amounts to no more than a quit-claim; or to make the consideration of a warranty deed nominal, which has the same practical effect.

WARRANTY DEED ON PATENTED CLAIM.

THIS INDENTURE, made this *tenth* day of *January*, in the year of our Lord one thousand nine hundred and eight, between *Henry P. Lowe*, of the City and County of *Denver*, State of *Colorado*, party of the first part, and *Willis B. Herr* of *Seattle*, State of *Washington*, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of *ten thousand* dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns:

All the following described real estate, situate in *Alhambra* Mining District, County of *Park*, State of *Colorado*, to wit:

The Fickle Goddess Lode Mining Claim, known as Survey Lot *No. 777*, being 1,500 feet in length and 300 feet in width, situate on South Mountain.

Together with all and singular the mines, minerals, lodes and veins within the lines of said claim, and their dips and spurs and all dumps, plant, fixtures, improvements, rights, privileges and appurtenances thereunto in anywise belonging.

To have and to hold the lands, tenements and hereditaments hereby conveyed unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part, for himself, his heirs, executors and administrators, doth hereby covenant and agree with the said party of the second part, his heirs and assigns, that the said premises and every part thereof,

are free and clear of and from any and all liens, incumbrances, trusts and taxes, and that he, the said party of the first part, his heirs, executors and administrators, unto the said party of the second part, his heirs and assigns, the said premises and every part thereof, against himself, his heirs and assigns, and every other person lawfully claiming or to claim the same or any part thereof, SHALL AND WILL WARRANT AND FOREVER DEFEND; *always saving and excepting the same provisos, reservations and limitations contained in the patent of the United States issued for said survey lot.*

In witness whereof the said party of the first part hath hereunto set his hand and seal.

HENRY P. LOWE. [SEAL.]

STATE OF COLORADO, City and County of *Denver:* ss.

I, *Arthur R. Morrison,* a Notary Public in and for said County, do hereby certify that *Henry P. Lowe,* who is personally known to me to be the same person described in and who executed the within indenture, personally appeared before me this day and acknowledged that he signed, sealed and delivered the said indenture as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal this *tenth* day of *January,* A. D. *1908.* *Arthur R. Morrison,*
[SEAL.] Notary Public.

The Date of Expiration of Commission Is Required to be noted on all acknowledgments and affidavits taken before a notary public under Colorado Statute.—*R. S. Sec. 4664.*

Warranty of Claim Entered for Patent.

Use the same form inserting the words "*to be*" before "issued" and adding the words "*as entered in the Land Office*" after the words "said survey lot" in the saving clause of the warranty.

Warranty of Possessory Claim.

Use the same form as for "Patented Claims," omitting the words "*Survey Lot No.*—," and omitting the clause in italics. Instead of such clause insert "*always saving and excepting the United States of America.*"

Special Warranty.

When the grantor desires to warrant his own chain of title, but not against parties claiming under

other locations, insert before the words "shall and will warrant," this clause:

"*By, through or under the said party of the first part, or his grantors.*"

QUIT-CLAIM DEED.

THIS INDENTURE, made this *thirty-first* day of *January*, in the year of our Lord one thousand nine hundred and eight, between *J. Stanley Jones*, of the City and County of *Denver*, State of Colorado, party of the first part, and *Henry C. Beeler*, of the County of *Laramie*, State of *Wyoming*, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of *one thousand* dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath remised, released and quit-claimed, and by these presents doth remise, release and quit-claim unto the said party of the second part, his heirs and assigns:

All the following described real estate, situate in *The Consolidated Ten Mile* Mining District, County of *Summit*, State of *Colorado*, to wit:

The GRACE CURRIER lode mining claim, *Survey Lot No. 666*, 1,500 feet in length and 150 feet in width, located on the west slope of *Sheep Mountain*.

Together with all and singular the lodes and veins within the lines of said claim, and the dips, spurs, mines, minerals, dumps, fixtures, improvements, rights, privileges and appurtenances thereunto in anywise belonging.

To have and to hold the lands, tenements and hereditaments hereby conveyed unto the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said party of the first part hath hereunto set his hand and seal.

J. STANLEY JONES. [SEAL.]

Acknowledge as on *page 267*.

A Quit Claim Deed is commonly used where the title is possessory, and where the title is clear it passes the title as effectually as a warranty. But the grantee in a quit-claim may be chargeable with notice of equities not chargeable to a purchaser by a general or special warranty.—*Hannan v. Seidentopf, 86 N. W. 45.* Where the grantee knows that another is in adverse possession of what he is buying, he is not an innocent purchaser.—*Wetzstein v. Largey, 27 Mont. 212; 70 P. 717.*

Mining Deeds.

There has come into use a form of deed called a Mining Deed, the blanks for which vary. They contain after the space left for description, the formula "Together with the Dips," etc., substantially as in the above forms. A deed to a mine does not differ from a deed to other real property in the same condition of title, except in the description, and the phrase "Together with, etc.," which is really part of the description. Most of these deeds contain in their granting clause the operative words of a warranty in connection with the operative words of a quit-claim—"grant, bargain and sell," "remise, release and quit-claim."

But their legal effect is more that of a quit-claim than that of a warranty, except that the words "grant, bargain, sell and convey" have the special force of passing an after acquired title, and by legislation the word "grant" in some States is made to imply a warranty against incumbrances. In examining abstracts they will of course be considered as transferring the grantor's interest, but no lawyer or trained conveyancer would advise such deed, or any form of statutory deed where certain words are declared to have a certain talismanic charm, in preference to the known, fixed and understood grants and covenants of a common law warranty.

Short Form of Deed.

By Colorado Act of 1887 (Laws, p. 226) short forms of deeds were introduced.

"The implied warranty which the vendor in ignorance of its nature is made liable for by this statutory form, is totally inapplicable to mining claims whether patented or possessory. It would make the vendor liable, if liable for anything, for a fee simple title even to making good the exceptions on the face of the patent. If used in conveying a possessory claim there is a breach of the warranty the moment the instrument is delivered. What is conveyed by the so-called short form of quit-claim deed, it is im-

possible to say. The entire set of forms should be discarded."

The above paragraph is the language used about these statutory forms of deeds in the sixth edition of this book. We have never qualified it and only add that the Act was repealed at the 1889 session.

Description.

The exact description of a located lode or placer is "The.....Lode Mining Claim" or "The..... Placer Mining Claim." If patented add the words "Survey Lot No....." The number of the mineral entry is superfluous, and to describe the premises by metes and bounds is not good conveyancing, except, of course, when a fraction of a claim is conveyed. The name is usually a sufficient description. —*Smith v. Sherman Co. 31 P. 72; Glacier Co. v. Willis, 127 U. S. 472.* The word "mine" is a dangerous term and to be avoided, as often an entire group of claims are known collectively by the name of one mine, and such entire group might pass, and, in fact, might be intended to pass by the use of such sweeping term.—*Smith v. Sherman Co. 31 P. 72; Phillips v. Salmon R. Co. 72 P. 886.* The word "lode" is commonly used as synonymous with lode mining claim.—*Buckeye Co. v. Carlson, 66 P. 168.*

A contract to convey a mining claim by name implies that vendor has a located claim and not a mere prospect.—*La Grande Co. v. Shaw, 72 P. 795.*

Deed Subdividing Lode Claim—Dip.

Owing to the relation of the dip to the strike, when a line is drawn across a lode claim at right angles to the side lines at the surface, such line being intended for the division line between the part retained and the part sold, such line when carried vertically downward may cut off the vein on its dip in such a way as to divide it in an unexpected manner. If, for instance, at the surface, it begins at the "west end of discovery shaft," it may leave the bottom of such shaft entirely on one fraction of the lode within a comparatively few feet of sinking.

Such result or a similar result will invariably occur where the vein has a dip, unless the end lines are at an exact right angle to the strike of the vein.—*See Plat, p 178.*

Apex Rights of Irregular Fraction.

Where the whole lode is conveyed there is no doubt that the deed carries the right to follow it on the dip to the full extent the grantor may have had such right. The same, if a certain number of feet off either end of the claim are conveyed, to the extent of feet granted.

But where a strip or irregular fraction of the claim is carved out and sold the question of the apex rights of such segregated parcel arises, and the tendency of the decisions is that the grantee has the right to follow on the dip whatever veins may apex on the ground. Of course such right would be limited by the end lines and planes projected from the end lines of the claim.

In *Stinchfield v. Gillis, 80 P. 839*, it was held that all veins apexing within the surface area are conveyed although carried by the dip into other land of the grantor.

In *Boston Co. v. Montana Co. 89 F. 529*, it was held that the grantee could follow on the projection of one of the lines of the pentagonal tract described, the same as if it were an end line in a patent. This gave to one party diverging, and to the other, converging end planes. The contention that each party was to follow as much of the vein as apexed within his own territory both governed by parallel end line planes always seemed to us the more just, simple and reasonable rule to apply to this class of cases.

The rule contended for has been adopted by the Supreme Court of Montana, and the ruling in the Federal case disapproved.—*Montana Co. v. Boston Co. 70 P. 1114.*

In settlement of disputed title between the Nine Hour and St. Louis Lodes, The Montana Co. conveyed to the St. Louis Co. a strip of the disputed

ground 30 feet wide by 400 feet in length. The deed conveyed the strip with the dips, spurs and angles and "all the mineral therein contained." Afterwards a vein not then known to exist was found to dip underneath this strip. The Federal Courts below allowed the grantor to work this vein underneath the strip, but the Supreme Court finally held that the words above quoted were a common law grant and covered the ore in this dipping vein between the vertical lines of the strip. And they further intimated that the grantor might have a right of way to get at its vein beyond the strip.—*Montana M. Co. v. St. Louis M. Co. 204 U. S. 204*, overruling *102 F. 430 and 104 F. 664.*

Cross Lodes.

The *Stinchfield case, supra*, as reported in *40 P. 98*, holds that the grantor cannot claim for his vein retained, any rights as a cross lode, without special reservation to that effect.

Same Ground Covered by Conflicting Locations.

The owners of the Edna, after record, changed their stakes so as to produce a conflict with the Lightning. They then sold the Edna by the recorded description and afterwards bought the Lightning. Held that they were estopped to set up the Lightning title against the ground in conflict.—*Shreve v. Copper Bell M. Co. 28 P. 315.*

Where the same lode or ground is covered by more than one location owned by the same grantor his deed of one may be construed to convey the title under both locations.—*Weill v. Lucerne Co., 11 Nev. 200; 3 M. R. 373; Phillpotts v. Blasdel, 4 M. R. 341; 8 Nev. 61; Lebanon Co. v. Cons. Rep. Co. 6 Colo. 372; Shoshone Co. v. Rutter, 87 F. 801.* For construction of conveyance in general terms after portion of a survey lot had been segregated by judgment, see *Mollie Gibson Co. v. Thatcher, 57 F. 865.*

The locator of a lode claim afterwards secured a placer patent covering the same ground after he

had conveyed a part of the lode location to third parties. *Held*, that his patent perfected title to his grantee for the ground conveyed.—*Collins v. McKay, 92 P. 295.*

Severance of Mines and Surface Reservation.

Where minerals are specially granted or where surface is granted without the minerals, there should be special covenants for support of the soil and buildings or for right of entry to get at the minerals reserved, as the case may be; although in such cases those incidents are implied to the extent necessary to enjoy each severed estate. *See p. 240.*

FORM OF RESERVATION.

Insert after the clause "To have and to hold:"

Always saving, excepting and reserving unto the said party of the first part, his heirs and assigns, all mines and minerals, lodes, veins and deposits found or to be found under or within the lines or area of the above granted premises with such reasonable use of the surface ground as may be necessary to win, work and carry away said minerals so excepted and reserved.—*Rogers, p. 880; Bainbridge, p. 480.*

While the distinction between an exception and a reservation is well established the words are often used interchangeably.—*Moore v. Griffin, 83 P. 395.*

Witnesses.

No attesting witnesses are required to deed conveying land in Colorado or the other States or Territories of the Pacific slope excepting Utah and Wyoming, which require one attesting witness, and Alaska and Oregon which require two. A deed signed with the grantor's mark must be always witnessed on general principles. A deed of a mining claim in Alaska not acknowledged and not having two witnesses is void.—*Alaska Ex. Co. v. Northern Co. 152 F. 145.*

Dower—Wife's Signature.

In all those States where the right of dower exists the wife must of course join in the husband's deed, in order to bar her right. These States (and

the Eastern States generally) are Alaska, Montana, Oregon and Utah. In Arizona the wife must join in husband's deed except for unpatented mining claims.

The widow has no right of dower in a mining claim held by possessory title.—*Black v. Elkhorn Co. 163 U. S. 445.* Otherwise as to mines owned in fee.—*Whittaker v. Lindley, 3 S. W. 9; Stoughton v. Leigh, 5 M. R. 47; 1 Taunt. 402.*

Husband's Signature Necessary.

The husband is required to join in the wife's deed in Alaska. In California and Washington, in a conveyance of community property the husband must join in the wife's deed and the wife in the husband's deed. In all cases where both are required to join, it is assumed that a separate acknowledgment by the wife, is required.

Acknowledgments.

An acknowledgment before a notary public is customary and valid in any of the Pacific States or Territories, though the land lies in one state and the acknowledgment is taken in another. Where the deed conveys land in another State a commissioner of deeds for such State, if accessible, is always authorized to take the acknowledgment. When taken before this officer no certificate of his official character is required.

Other officers are named in the statutes of the several States, but a notary public within the State, a commissioner or notary without the State, and a consul in foreign countries, are legalized to prove deeds by this form in all the aforesaid States and Territories.

For form of acknowledgment by an individual see page 267. The following are correct forms in the case of corporations and deeds executed under Power of Attorney:

ACKNOWLEDGMENT BY CORPORATION.

STATE OF COLORADO, *Hinsdale* County: ss.

I, *William L. Siegmund, a Notary Public* in and for said County, do hereby certify that *John E. Searles,* President of the *Coldstream* Mining Company, who is personally known to me to be such President, and the same person who as such President, subscribed the corporate name and caused the corporate seal of said Company to be affixed to the above Indenture, personally appeared before me this day and acknowledged the same to be the free and voluntary act and deed of the said corporation for the uses and purposes therein set forth.

Witness my hand and Notarial Seal this *third* day of *January,* A. D. *1908.*

Wm. L. Siegmund,
Notary Public.

[SEAL.]

BY ATTORNEY IN FACT.

UNITED STATES OF AMERICA, DISTRICT OF COLORADO: ss.

I, *Charles W. Bishop,* Clerk of the Circuit Court of the United States in said District, do hereby certify that *Jean F. Webb,* Attorney in Fact, of the within named *George W. Brooks,* who is personally known to me to be such Attorney in Fact, and the same person within described as such Attorney in Fact, and who affixed the name and seal of his said principal to the within Indenture, personally appeared before me this day and acknowledged the said Indenture to be his free and voluntary act and deed and the free and voluntary act and deed of the said *George W. Brooks* for the uses and purposes therein set forth.

Witness my hand and the Seal of said Court, this *third* day of *January,* A. D. *1908.*

Charles W. Bishop,
Clerk of Court.

[SEAL.]

Corporate Deeds.

The presence of the Corporate Seal is *prima facie* proof that it is the deed of the Corporation. A third party cannot attack the validity of a corporate deed for non-compliance with the statutory requirements. Such requirements are for the protection of the stockholders.—*Galbraith v. Shasta Co. 76 P. 901.*

Agreements for Deed are often in the shape of a title bond, time being made of the essence of the contract in every form in use; but an executory contract in any other form is of equal validity.—R. S. Colo. §§ 682, 683, 694. A title bond or any other paper purporting to allow an option to purchase should always show more than a nominal part of the

consideration as paid or contain some express covenant by the vendee, to make some payment or expenditure, as for instance to do certain specified work upon the property—to avoid the possibility of its being held void for want of mutuality.

Naked title bonds have been ruled to be mere options, and therefore without consideration and revocable.—*Smith v. Reynolds, 2 M. R. 227; 8 F. 696; Finerty v. Fritz, 5 Colo. 174; 1 M. R. 437; Gordon v. Darnell, 2 M. R. 220; 5 Colo. 302.* But where the holder of the bond pays a part of the consideration or agrees to develop the property or in any other manner gives a valuable consideration the agreement is valid as a contract binding on the parties, and when recorded binds the property.—*Penn. M. Co. v. Smith, 56 Atl. 426.*

The right of choice is what the option holder pays for. An option contract is necessarily non-mutual.—*Pittsburg Co. v. Bailey, 90 P. 803.*

A party has the right to agree to convey property to which he has at the time no title.—*Donovan v. Hanauer, 90 P. 569.*

TITLE BOND.

KNOW ALL MEN BY THESE PRESENTS, That I, *Dennis Sullivan*, of the City and County of *Denver*, State of Colorado, *am* held and firmly bound unto *David F. Day*, of the County of *Ouray*, in said State, in the penal sum of *forty thousand* dollars, to be paid to the said *David F. Day*, his heirs, executors, administrators or assigns; to which payment, well and truly to be made, *I* do bind *myself, my* heirs, executors and administrators, and every of them, jointly and severally firmly by these presents.

Witness *my* hand and seal, this *fourth* day of *May*, in the year of our Lord one thousand nine hundred and seven.

WHEREAS, The above bounden obligor *hath* this day sold to the said *David F. Day* certain real estate situate in *Battle Mountain* Mining District, County of *Eagle*, State of Colorado, to wit: The *Legality* Lode Mining Claim, Survey Lot *No. 99*, containing 1,500 feet in length by 300 feet in width, on *Battle Mountain*.

Together with all and singular the lodes and veins within the lines of said claim (and not excepted on the official plat) and all mines, minerals, dumps, plant, fixtures, machinery, tramways, improvements, rights, privileges and appurtenances thereunto in anywise belonging.

For the sum of *twenty thousand* dollars to be paid to the said obligor, his executors, administrators or assigns, or deposited to his credit in the *First National Bank, Denver*, Colorado, on or before the *tenth* day of *May*, A. D. *1908*, and for the further consideration that said obligee shall, before the said last mentioned date, expend the sum of at least *one thousand* dollars in the actual underground development of said property.

NOW, THEREFORE, the condition of the above obligation is such that if the above bounden obligor, *his* heirs or assigns, on payment or deposit of the said sum of *twenty thousand* dollars in manner aforesaid, and expressly within the time limited as aforesaid, time being of the essence of this contract, as to such payment or deposit, shall make, execute, acknowledge and deliver at *his* own cost and charges, good and sufficient deed or deeds of *general warranty* to the said *David F. Day*, his heirs and assigns, or to such person, persons or company as *he* shall nominate, conveying said premises with good and perfect title, free from encumbrance, then this obligation to be void, otherwise to remain in full force and virtue.

DENNIS SULLIVAN. [SEAL.]

In consideration of the option expressed in this obligation, I agree to expend the sum of $1,000 therein mentioned in the actual underground development of the above described property within three months from the date of this Bond.

Witness my hand and seal this *fourth* day of *May*, A. D. *1907*. DAVID F. DAY. [SEAL.]

Where one of several parties executes a mining agreement on behalf of all, with their knowledge, they may (in instances) be held without signing.—*Rice v. Ege, 16 M. R. 179; 42 F. 661.*

Time Is of the Essence of the Contract in a title bond on a mine.—*Presidio Co. v. Bullis, 4 S. W. 860; Merk v. Bowery Co. 78 P. 519.* Or in suit for specific performance.—*Durant v. Comegys, 28 P. 425.* And in mining contracts generally.—*Waterman v. Banks, 144 U. S. 394.* It may be made so either from the nature of the subject matter or the contract of the parties.—*Settle v. Winters, 10 P. 216.*

But it may be waived verbally or by allowing the vendee to work on assurances of extension.—*Mason v. Sieglitz, 44 P. 588; Presidio Co. v. Bullis, supra.* And delay may be explained even in a specific performance case.—*Hosmer v. Wyoming Co. 129 F. 884.*

Default After Part Payment.

The forfeiture of part payments as liquidated damages has been generally upheld.—*Clark v. American Co. 72 P. 978; Garcin v. Penn. Co. 71 N. E. 793.*

WORKING CONTRACT SALE.

For and in consideration of the sum of $500 to me in hand paid by *Orrin F. Place, the* receipt whereof is hereby acknowledged, I, *Charles H. Morris,* do hereby agree to place said *Orrin F. Place* in full and sole possession and control of the *Fair Deceiver* Lode Mining Claim, situate, etc., with authority to work and prospect the same as he sees fit for the term of *sixty days* from date, provided only, that such work be done in good and workmanlike manner, and that any ore taken out shall be separated and left on the dump, and not removed during the lifetime of this contract. And at any time within said period, on tender to me of the further sum of $4,500, I agree to deliver a good and sufficient warranty deed to the said *Orrin F. Place,* his heirs and assigns, conveying said above described premises absolutely and clear of encumbrance.

In case no such tender is made, said sum of $500 is to be treated as the consideration of this option and right of testing and to be and remain my property as liquidated damages.

In case my title is found defective and I fail to make it good and marketable within said period, I agree to pay said *Orrin F. Place* the cost of abstract and the vendee's attorney's reasonable charges for examination of title, and to refund said sum of $500.

The ore taken out during said period is to be the property of the party who remains or becomes the owner at the end of said period of sixty days.

Time is of the essence of this contract in all particulars.

Witness my hand and seal this *10th* day of *May,* A. D. *1907.* CHARLES H. MORRIS. [SEAL.]

In consideration of the delivery to me of the above option, I agree to expend at least $500 in work upon the above described property within the lifetime of said option.

Witness my hand and seal the date above written.

ORRIN F. PLACE. [SEAL.]

A vendor cannot re-enter and at the same time collect the purchase money notes. He cannot have both remedies.—*Manson v. Dayton, 153 F. 258.*

SALE SUBJECT TO EXAMINATION OF TITLE.

The undersigned, *James W. Swisher,* of *Breckenridge,* State of Colorado, hath agreed to sell to *Frank M. Taylor,* of *Denver,* in said State, and said *Frank M. Taylor* hath agreed to buy of and from said *James W. Swisher* the *Corinne*

Rowland Lode Mining claim, situate in *Gregory* Mining District, *Gilpin* County, Colorado, for the consideration of $18,000 to be paid within *six months* from date, fee simple (or good possessory) title to be delivered and warranted clear of liens. Title subject to approval of *J. W. B. Smith*, attorney for purchaser. Cost of deeds to be paid by vendor; of examination of title by purchaser. Vendor to deliver at his own cost certified abstracts of title within ten days to said attorney. Deeds to pass on tender of the sum above mentioned within the period of six months above limited.

If no tender is made within such period the purchaser shall be in default unless he show the title materially defective, or a prior breach of contract by vendor, or that material misrepresentations as to the mine or mineral have been made to him by the vendor or by parties in the interest of the vendor, and thereupon either party may proceed for specific performance or for damages or both or otherwise as he may be advised.

Witness the hands and seals of said parties this *24th* day of *April*, A. D. *1907*.

JAMES W. SWISHER. [SEAL.]
FRANK M. TAYLOR. [SEAL.]

The right to examine the abstract of title before payment is a condition precedent in the nature of things.—*Penn. Co. v. Thomas, 54 Atl. 101.*

CONTRACT TO SELL AND TO BUY.

I, *Joel F. Vaile*, vendor, hereby agree to sell to *Charles S. Thomas*, and I, *Charles S. Thomas*, purchaser, agree to buy of said *Joel F. Vaile*, the *Dream* Placer Mining Claim, situate, etc.

The agreed consideration of said sale is $1,000 cash in hand paid, the receipt whereof is hereby acknowledged; $3,000 to be paid within *sixty days* from the date hereof, and $6,000 within ninety days from such date, making a total consideration of $10,000.

Said vendor within ten days from date will deliver to purchaser, or his attorney, an abstract of title duly certified by the clerk and recorder of said county, or by some reputable abstract office, together with all the original title papers which are in his possession or within his power to produce.

And within said time will place in escrow in the *National Bank of Commerce, Denver*, a good and sufficient warranty deed conveying to said *Charles S. Thomas*, or such person as he shall nominate, the said premises clear of encumbrance, to be by such bank held in escrow until final payment be made under this contract or default is made under the same. Deposit in said bank to the credit of vendor shall be equivalent to payment of any of said instalments.

Time is of the essence of this contract as to each and every instalment, and if any instalment or instalments

be not paid within the time or times hereby limited therefor, all previous instalments shall be and remain the property of said vendor, the deed in escrow shall be returned to him for cancellation, and the property shall remain his own, unaffected and unencumbered by this contract. But if he fail to deliver abstract within said period, or to deposit said deed in escrow, or if his title prove encumbered or otherwise not marketable, vendee may recover any and all instalments paid, or may sue for specific performance and for a perfect title, or for damages or otherwise as he may be advised.

Witness the hands and seals of said parties this *tenth* day of *May*, A. D. *1907*.

JOEL F. VAILE. [SEAL.]
CHARLES S. THOMAS. [SEAL.]

A better because a fairer contract than the last above given, is a sale by deed, securing the unpaid instalments by note and mortgage.

The terms of sale are so variant and the temptations to evade become so great with the fluctations in value, that it is always preferable to state the bargain fully to an attorney jointly agreed on and whose compensation is not made contingent on the sale, and to have him place the bargain in such form as will express, without fiction or verbiage, the real intention of the parties.

Lease and Option.

Perhaps the most usual and in most instances the preferable form of executory sale is that of Lease and Option.

At the end of the lease in the usual form (p. 285), but just preceding the final or testamentary paragraph, proceed as follows:

THE OPTION.

And in consideration of the acceptance of the foregoing lease and the expenditures to be made thereunder and the well and faithful keeping of the covenants thereof, the said lessee shall have the right to purchase the said demised premises by payment of the sum of *ten thousand* dollars on or before the *first* day of *May*, A. D. *1908*, time being of the essence of the contract as to such payment. And upon the tender of such payment the lessor will make, execute, acknowledge and deliver at his own cost and charges, good and sufficient deed or deeds of *warranty* to be delivered to the lessee or such person or company as he

shall nominate, conveying the said premises clear of incumbrance.

The forfeiture, surrender or termination of the above lease for any cause shall render this option void, and the above mentioned payment may not thereafter be tendered.

In the above form the covenants of the lease make a valid consideration for the option. In the absence of a clause defeating the option on forfeiture of the lease the option may be enforced although the lease has been forfeited.—*Mathews Co. v. New Empire Co. 122 F. 972.*

An agreement to work a mine is good consideration for a promise to sell it.—*Clarno v. Grayson, 46 P. 426.* It follows that the acceptance of a working lease is good consideration for an option on the same property, and the combination of the two contracts in the same or by distinct papers is of common occurrence. See Form, *page 280.*

Time, though made the essence of the contract, may be waived or relieved against in equity upon proper facts.—*Wheeling Co. v. Elder, 46 S. E. 357.*

Escrow.

Where a title bond or other executory contract is delivered it is usually accompanied by a deed executed and acknowledged and placed in *escrow.* An escrow amounts to a deposit with a third party of an unrecorded deed to be delivered on certain conditions, the title bond or other executory contract being actually delivered and held in the meantime. Such escrow is usually in the shape of a deed enclosed in a sealed envelope and endorsed as follows:

To Wm. B. Morrison, Cashier, National Bank of Commerce, *Denver:* You are authorized to deliver the within deed to *Thomas F. Walsh,* his agent, or order, upon payment to me, or deposit to my order, of the sum of *ten thousand* dollars, on or before the *first* day of *January,* A. D. *1908.* Meanwhile you will hold the same irrevocably. If payment is not made on or before said date, you will return the same to me for cancellation.

Sept. 30, 1907. Luther M. Goddard.

An escrow is often placed on deposit without any title bond, or the agreement is delivered on con-

dition of not going on record, the vendor objecting to clouding the title by recording executory agreements which will perhaps never result in conveyance. Such an escrow or agreement (not recorded) if on good consideration, is valid in all respects, except that of giving the purchaser record security.—*Wolcott v. Johns, 7 Colo. App., 361.* The deed relates back to the date of the Escrow agreement as to all who had notice of the Escrow.—*Whitmer v. Schenk, 83 P. 775 (Ida.).*

Unrecorded Claim.

An incomplete location may be transferred by parol and the record completed by the purchaser.—*Doe v. Waterloo Co. 70 F. 456; Miller v. Chrisman, 73 P. 1083.* A prospect on the public domain may be the subject of lease or conveyance.—*Weed v. Snook, 77 P. 1023.*

Acknowledgments to Contracts.

No instrument needs acknowledgment except such as is intended to be placed of record; if an instrument is recorded without acknowledgment, it may be valid as notice, but the original must be produced or accounted for when used in evidence—a certified copy is not evidence. An acknowledgment is not a part of the instrument, but supplies a mode of proving its execution without witnesses and for obtaining a valid copy when lost or mislaid.

Fraudulent Sale.

Where a sale has been induced by fraud the injured party may either rescind or sue for damages. —*Byard v. Holmes, 33 N. J. L. 119; 6 M. R. 598; Smith v. Bolles, 16 M. R. 159; 132 U. S. 125.*

If he do neither, but continue to exercise acts of ownership over the property purchased, he may be estopped even to plead the false representations to an action on the contract.—*Butler v. Rockwell, 14 Colo. 126.*

The right to rescind must be exercised at once upon discovery of the fraud. Buyers of a mine cannot after such alleged discovery work the property and thereafter elect to rescind.—*Richardson v. Lowe, 149 F. 625; Old Colony Co. v. Carrick, 153 F. 173.* The absence of prompt action to rescind is an election to affirm.—*Steinbeck v. Bon Homme M. Co. 152 F. 333.*

Proof is admissible that defendant had attempted to salt the same mine on other persons.—*Mudsill Co. v. Watrous, 61 F. 163.* Sale of worthless stock may be set aside on like principles as the sale of the mine.—*Ormsby v. Budd, 33 N. W. 457.* False representations made by officer are not necessarily chargeable to the company.—*Watson Co. v. James, Id. 622.* A party is bound, where he assumes to know and makes assertions acordingly.—*Lehigh Co. v. Bamford, 150 U. S. 665.*

Assertions of value are as a rule only expressions of opinion.—*Id.* But otherwise as to statements that the lands sold include a certain ore bed. —*Chatham Co. v. Moffatt, 16 M. R. 103; 147 Mass. 403.* And opinions and promises (false averments of large means and extensive operations intended) may amount to actual fraud.—*Rorer Co. v. Trout, 83 Va. 397.* The same as to promises never intended to be performed.—*Lawrence v. Gayetty, 78 Cal. 126.*

A party cannot cover up a fraud by using his wife's name.—*Largey v. Bartlett, 44 P. 962.*

The parties will not be allowed to stand by and await the result of the adventure before suit.—*Blen v. Bear River Co. 3 M. R. 435; 20 Cal. 602.*

Delay without sufficient excuse bars the remedy. —*Great West Co. v. Woodmas Co. 14 Colo. 90.*

The right to set aside a sale for fraud does not survive against executors.—*Stratton's Ind. v. Dines, 126 F. 968; 135 F. 449.* Where an agent buys a mine for less than he reports to his principal he is liable for the difference to his principal in assumpsit. —*Humbird v. Davis, 59 Atl. 1082.*

And between associates none can secure a secret profit on the sale. Recovery in such case does not depend on proof of actual fraud.—*Sun Dance Co. v. Frost 64 P. 435; 21 M. R. 252; Upton v. Weisling, 71 P. 917; Christy v. Campbell, 87 P. 548.*

A purchaser is not chargeable with notice of his vendor's fraud in his original purchase.—*Kendrick v. Colyer, 42 So. 110.* A party who by his own act prevents the completion of an act of appropriation can take no advantage of his own wrong.—*Wolfskill v. Smith, 89 P. 1001.*

MINING LEASE.

Written or Verbal.

The lease if for more than one year must be in writing to avoid the Statute of Frauds. (*R. S. § 2662.*) If for a less period it is still often reduced to writing and the covenants being peculiar cannot be too particularly expressed. The actual possession taken by the lessee being notice of his rights, the lease generally is neither acknowledged nor recorded.

Under an ordinary surface lease at a fixed rent the tenant has no right to sink an oil well.—*Isom v. Rex Oil Co. 82 P. 317.*

Set Work.

In large mines worked on the tribute system, the lease is usually verbal between the manager and the miner, and is more in the nature of a contract of hiring, the foreman retaining general control of the work.

Dead Work.

The following form is correct to the extent of the usual covenants, but there are often special covenants added in regard to "dead work" and other matters. Dead work is a term of the popular language and means sinking shafts and running drifts,

adits or cross-cuts, or it may embrace everything except *stoping* and the timbering incidental to stoping. Its meaning being so general it should not be used at all in the instrument and the intention should be covered by more exact expressions.

It is a common stipulation to require no royalty for ore extracted in sinking or in driving levels. Where dead work is to be paid for, care should be taken to express whether the compensation is to come "out of the first mill returns" or "out of the royalty." In the latter case the lessor pays for all of it. In the former he pays a share equivalent to his proportion of the proceeds.

The Royalty Reserved Necessarily Varies, 20 or 25 per cent. being the usual amount, and 5 and 75 per cent. being extreme limits.

FORM OF LODE LEASE.

THIS INDENTURE, made this *first* day of *May*, in the year of our Lord one thousand nine hundred and seven, between *Dexter G. Cahoon, of Rochester, State of New York*, lessor, and *Frank H. Stanwood, of Salina, State of Colorado*, lessee or tenant: Witnesseth, that the said lessor, for and in consideration of the royalties hereinafter reserved and the covenants and agreements hereinafter expressed, and by the said lessee to be kept and performed, hath granted, demised, and let and by these presents doth grant, demise and let unto the said lessee all the following described mine and mining property, situate in *Four Mile* Mining District, County of *Routt*, State of Colorado, to wit: *The Owl Bird Lode Mining Claim, Survey Lot No. 172*, together with the appurtenances.

To have and to hold unto the said lessee, for the term of *one year* from date hereof, expiring at noon on the *1st* day of *May, 1908*, unless sooner forfeited or determined through the violation of any covenant hereinafter against the said tenant reserved.

And in consideration of such demise, the said lessee doth covenant and agree with said lessor as follows, to wit:

1. To enter upon said mine, or premises, and work the same mine fashion, in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible, with due regard to the development and preservation of the same as a workable mine, and to the special covenants hereinafter reserved.

2. To work and mine said premises as aforesaid steadily and continuously from the date of this lease with at least two persons employed underground, for at least 20 shifts to the man each calendar month.

3. To well and sufficiently timber said mine at all points where proper, in accordance with good mining; and to repair all old timbering wherever it may become necessary.

4. To allow said lessor and his agents from time to time, to enter upon and into all parts of said mine for purposes of inspection.

5. To not assign this lease or any interest thereunder, and to not sublet the said premises or any part thereof, without the written assent of said lessor, and to not allow any person not in privity with the parties hereto, to take or hold possession of said premises, or any part thereof, under any pretence whatever.

6. To occupy and hold all cross or parallel lodes, spurs or mineral deposits of any kind which may be discovered by the said lessee, or any person under him, in any manner, by working within, or from the demised ground, as the property of said lessor with privilege to said lessee of working the same as parcel of said demised premises.

7. To keep at all times the drifts, shafts, tunnels and other workings thoroughly drained and clear of loose rock and rubbish, unless prevented by extraordinary mining casualty.

8. To do no underhand stoping, and to make all shafts 7 feet long by 4 feet wide in the clear, and all drifts 6 feet high by 4 feet wide in the clear.

9. To pay to said lessor as royalty 25 per cent. of the net mill returns of all ore to be extracted from said premises by delivery of such ore with all convenient speed in lots as mined to some mill or regular ore buyer in Denver or Pueblo, and leaving with such mill or ore buyer the percentage of mill returns aforesaid for delivery to the lessor.

10. To deliver to said lessor the said premises with the appurtenances, and all improvements in good order and condition, with all drifts, shafts, tunnels and other passages thoroughly clear of loose rock and rubbish, and drained, and the mine ready for immediate continued working (accident not arising from negligence alone excusing) without demand or further notice, on the said *1st* day of *May*, A. D. *1908*, at noon, or at any time previous, upon demand for forfeiture.

11. And finally, that upon violation of any covenant or covenants hereinbefore reserved, the term of this lease shall, at the option of the said lessor, expire, and the same and said premises, with the appurtenances, shall become forfeit to said lessor; and said lessor or his agent may thereupon, after demand of possession in writing enter upon said premises and dispossess all persons occupying the same, with or without force and with or without process of law; or at the option of said lessor the said tenant and all persons found in occupation may be proceeded against as guilty of unlawful detainer. (*Here insert option, p. 280.*)

Each and every clause and covenant of this Indenture shall extend to the heirs, executors, administrators and lawful assigns of all parties hereto.

In witness whereof, the said parties have hereunto set their hands and seals.

DEXTER G. CAHOON. [SEAL.]
FRANK H. STANWOOD. [SEAL.]

For acknowledgment, if desired, see *p.* 267.

Special Covenant Against Miners' Liens.

8 a. To promptly pay for all labor and supplies to be done for, or furnished to, the said lessee or any person or persons under or in privity with him upon said premises, and to deliver to the lessor on or before the fifteenth day of each calendar month during the term of this lease, a written statement showing that all labor and supplies have been paid for, or the amount due and owing for such labor and supplies; and if any lien be filed or if any such report shows any part of the pay roll, or other mine indebtedness unpaid, or if such indebtedness exist, whether shown by such report or otherwise, the lessor may, at his election, declare a forfeiture of this lease as hereinafter provided.

Covenant to Keep Notice Posted.

To at all times keep and maintain posted on said premises and each claim thereof a notice in substance, as follows:

For form of notice see *page 265.*

On low grade lodes reservations of a graded royalty are common. In such case discard covenant 9 above printed and insert:

Covenant for Graded Royalty.

9. To pay to said lessor as royalty 10 per cent. of the net mill returns of all ore to be extracted from said premises running 30 ounces of silver or under to the ton; 20 per cent. on ore running over 30 and not exceeding 50 ounces to the ton; 30 per cent. on all ore running over 50 ounces—by delivering all the ore in lots as mined to some mill or to some regular ore buyer in *Denver or Pueblo* and leaving with such mill or ore buyer the several percentages of mill returns as aforesaid for delivery to lessor.

Estimate of royalty after deducting freight and mill charges is said to be based on the "net" mill returns. Where the royalty is much graded and made dependent on the amount of lead or copper as well as silver or gold, the more simple form is to reserve it on the "price per ton" paid by the ore-

buyer, which is 90 to 95 per cent. of the bullion and base metal value, after deducting treatment charges; but in the "price per ton" the freight has not been estimated.

Royalty on Price Per Ton.

9. To pay to said lessor as royalty 10 per cent. of the net mill returns of all ore sold for $20 per ton or less, net price after deducting freight and mill charges, and 20 per cent. of the like net mill returns of all ore sold for more than $20 per ton net price as aforesaid by delivering all the ore in lots as mined to some mill or to some regular ore buyer in *Denver or Pueblo,* and leaving with such mill or ore buyer the several percentages aforesaid for delivery to the lessor.

Net mill returns are the sums paid for the values in the ore after deducting all charges for carriage in any form, assays and mill charges.

Freight is paid on the gross weight and the ore paid for on the net weight.

The mill returns, upon which settlement between lessor and lessee are made, are substantially according to the following form:

THE TAYLOR & BRUNTON SAMPLING WORKS COMPANY.

General Office 730 Symes Building, Denver.

Sampling Works at Aspen and Victor, Colo., and Salt Lake City, Utah.

DENVER, COLORADO, *September 14th, 1907.*

RECEIVED FROM *The Cowenhoven Tunnel Co., by R. Jones, Lessee,* THE LOTS OF ORE HEREIN DESCRIBED.

Sampler Lot No.	Description Car No.	Weights			Assays			Silver and Gold Percentage Paid	Lead Price per Unit	Working Charge	Price per Ton	Value at Smelter
		Pounds Gross	Per Cent. Water	Pounds Net	Ounces Silver	Per Cent. Lead	Ounces Gold					
212	C. M. 4163	64,400	7	59,892	36	18	1 1/10	95	50c	$3.19	$46.01	$1,377.81

$BaSo_4$	SiO_2	Fe	CaO	Zn	
19.3	6.2	7.5	9.5	3.6	12.6

Less Freight to Smelter.....		161.00
Value at Aspen.....		$1,216.81
Deduct Sampling Charges at 60c.	$ 19.20	
Deduct Tunnel Transportation..	9.60	
Deduct 10% Royalty for Owners.	121.68	150.48
		$1,066.33

NEW YORK QUOTATIONS.

Silver at per Ounce....$ .62

Lead at per 100 lbs.... 4.85

SOLD AS ABOVE

R. JONES,
Lessee.

SAMPLED AS ABOVE

THE TAYLOR & BRUNTON SAMPLING WORKS CO.,
W. S. Copeland, *Manager.*

PLACER LEASE.

Follow the above form except in the description and the numbered covenants which may be as follows:

Description.

The Yellow Bug Placer Mining Claim, Survey Lot No. 88, and 300 inches of water in the Arapahoe ditch.

Covenants.

1. To enter upon said mine or premises and work the same so as to take out the greatest possible amount of gold with due regard to the development and preservation of the unwashed ground for future continued working and to the special covenants hereinafter reserved.

2. To work and wash said premises steadily and continuously from the date of this lease with a force of at least two men and with as much of said water as can be obtained and used. Cessation of work for the total number of three secular days in any one calendar month shall be considered a violation of this covenant. But no work shall be required while the ground is frozen.

3. To take care of the dump and tailings so as to prevent their accumulation upon any ground of the lessor remaining unworked.

4 and 5. Same as lode lease.

6. To clean up the gold not oftener than once every two weeks and at least as often as once in four weeks and to give 48 hours' notice to lessor of the date intended for clean up, and at each clean up lessor shall have the right to be personally present or to send some one person to represent him and be present and assist at such clean up and at the retorting of the amalgam and the weighing of the retort, and to make no clean up, partial or general, without giving such notice.

7. To pay as royalty to the lessor 25 per cent. of the gross proceeds of working under this lease by delivery immediately after each clean up* of the whole of the retort to the lessor or to his agent present on the ground, and the said lessor covenants forthwith to cause the same to be shipped to the mint at Denver or to some regular gold buyer at Fairplay or Denver and to return to lessee 75 per cent. of the net proceeds.

8. To deliver to said lessor the said premises with the appurtenances in good order and condition and the ground and water ready for immediate continued use and working without demand or notice on said first day of May, A. D. 1909, or at any time previous upon demand for forfeiture.

Second Form of Royalty Covenant.

After the * proceed as follows:

To the lessor or to his agent present on the ground, of one-quarter by weight of the amalgam or of the retort as he may elect.

Third Form of Royalty Covenant.

After the * proceed as follows:

Of 25 per cent. of the net mint returns or proceeds of sale to some regular gold buyer at Fairplay or Denver for use of the lessor.

Covenant to Work.

Where royalty is reserved in the usual form there is an implied covenant to keep at work.—*Rorer Co. v. Trout, 5 Am. St. R. 285; Aye v. Philadelphia Co. 44 Atl. 555.* Otherwise where there is a fixed rent, or a rent based on an assumed minimum production.—*McIntyre v. McIntyre Co. 11 N. E. 645.*

The ordinary covenant to "take out the greatest amount of ore possible" is enforceable as such and is not a mere condition. The measure of damages in such case would depend on the amount of ore that could have been mined with reasonable diligence.—*Macon v. Trowbridge, 87 P. 1147.*

And for failure to commence work in a reasonable time the lease may be cancelled.—*McIntosh v. Robb, 88 P. 517.*

For breach of covenant the lessor may elect between forfeiture and damages.—*Brooks v. Gaffin, 90 S. W. 808.*

An agreement to work is not necessarily an agreement to work continuously.—*Caley v. Portland, 56 P. 350.* Failure to start work is same as quitting.—*Woodward v. Mitchell, 39 N. E. 439.* A parol agreement as to what shall be considered sufficient work is binding on lessor and his grantees.—*Bartley v. Phillips, 36 Atl. 217.*

To recover substantial damages against a lessee failing to work, the plaintiff must show that the ore could have been mined to a profit.—*Colo. F. Co. v. Pryor, 57 P. 51.*

Construction of long, formal, coal mine lease as to right to replace machinery and fixtures, change plan of approaches, abandon old workings, etc.—*Junction M. Co. v. Springfield M. Co. 78 N. E. 902.*

A lessee is not bound under covenant to return in as good condition as when received, to restore buildings accidentally destroyed by fire. *Id.*

There are many cases which hold that breach of covenant to work is excused when the ore in the mine becomes exhausted.—*Brooks v. Cook, 34 So. 960; 22 M. R. 456; Wilson v. Big Joe Co. 112 N. W. 89.*

Right to Quit.

Under the covenant to work in the above forms, the lessee has no right to quit at discretion. If such right is to be given, as in most instances of common equity it should be given, insert after the second covenant:

"The said lessee reserving the right to quit and abandon after at least two months' continuous work under this covenant."

or as the case may be. When the party quitting is to give notice it is not always material that it be given in the manner stipulated.—*McCahan v. Wharton, 121 Pa. 424; 16 M. R. 239.* The lessee may quit at will under a lease containing no covenant to work. —*Glasgow v. Chartiers Co. 25 Atl. 232; 17 M. R. 523.*

Co-Tenant Owners—Partnership Lessees.

The legal relation of co-lessees is that of partners.—*Meagher v. Reed, 14 Colo. 350; Manville v. Parks, 7 Colo. 128; 15 M. R. 565.* One of such co-tenants or co-partners cannot give a lease of the whole mine technically binding on all the co-owners, but where they cannot agree as to mode of working, a majority interest must control.—*Dougherty v. Creary, 30 Cal. 290; 1 M. R. 36; Blackmarr v. Williamson, 50 S. E. 254.* In *Paul v. Cragnas, 59 P. 857; 60 P. 983,* the lessee of a third interest was allowed heavy damages against the majority

owner disputing his right to enter and mine. We cannot gather from the opinion upon what theory this anomalous case was decided. BELKNAP, J., dissented. It was not based on plaintiff's right to a third of the profits.

Assessments—Forfeiture to Co-Partner.

An assessment is defined in *Shaw v. Horner, 7 Colo. App. 83*, as "an apportionment among the parties interested, of an amount of money necessary and not on hand for development purposes." It must be levied by one having authority, each partner must have notice of it and a forfeiture does not ensue for failure to pay unless there is some contract to that effect. Such a contract was enforced in *Joseph v. Davenport, 89 N. W. 1081.*

Fixtures.

Unless otherwise covenanted the fixtures belong to the lessee and are removable.—*Conrad v. Saginaw Co. 20 N. W. 39; 52 Am. R. 817.* And this applies to a forfeited lease.—*Mickle v. Douglass, 39 N. W. 198.* A mortgage on fixtures was held good after forfeiture in *Alberson v. Elk Creek Co. 65 P. 979.*

The casing of an oil well is not a removable fixture.—*Perry v. Acme Oil Co. 80 N. E. 174.* But may be made so by the contract.—*Churchill v. More, 88 P. 290.*

Letting by Agent.

The agent in charge has, under his general and implied powers, the right to let short leases of the ground, in blocks or parcels.—*Bicknell v. Austin Co. 62 F. 432.*

And though unauthorized to lease, if the company stand by and allow the lessee to spend money, they will be bound.—*Hoosac Co. v. Donat, 10 Colo. 529.*

Assignment.

A lessee is not in general released from personal liability by assigning his lease; but remains in the

nature of a surety to his landlord.—*Pittsburg Co. v. Greenlee, 30 Atl. 489; Wilson v. Gerhardt, 9 Colo. 585.*

A Non-Assessable Interest in a lease is an interest chargeable with its full share of all cost of mining, as well as of freight and treatment as far as the ore proceeds will pay such cost, but not chargeable in case of working to a loss. The decision in *Maloney v. Love, 11 Colo. App. 288*, holding it entitled to a full share of the gross proceeds is wholly against the meaning of the term as understood by miners.

In *Taylor v. Thomas (Colo.), 71 P. 382*, a non-assessable interest in a lease was charged with its full proportion of expenses to the extent of the ore proceeds. This decision necessarily overrules the Maloney case.

Forfeiture.

Unless the lease provide for forfeiture none occurs for non-payment of rent or breach of covenant. —*Plummer v. Hillside Co. 104 F. 208; Wakefield v. Sunday Lake Co. 49 N. W. 135.* A forfeiture enforced by collusion with employes of lessee is not lawful.—*49 N. W. 135.* Forfeiture cannot be enforced by a party who is himself in default.—*Ingram v. Golden Co. 65 P. 549.*

Draining and pumping is counted as labor under a covenant to keep at work.—*Miller v. Chester Co. 18 Atl. 565.*

Where parties have acted loosely in complying with the terms of lease the lessor cannot abruptly become strict and declare a forfeiture.—*Westmoreland Co. v. De Witt, 18 Atl. 724; Hukill v. Myers, 15 S. E. 151; Price v. Black, 101 N. W. 1056.*

In *Montrozona Co. v. Thatcher, 75 P. 595*, a lease was held forfeited for ten days' delay beyond the time limited to sink 100 feet. This seems a severe ruling.—*Mathews Co. v. New Empire Co. 122 F. 972; Jones v. Scott, 58 Atl. 281.*

When forfeiture is provided for on account of certain breaches, there is no forfeiture for other

breaches; and none for breach of implied covenants. —*Cove v. N. Y. Co. 43 S. E. 128; Rose v. Lanyon Z. Co. 74 P. 625.*

Miscellaneous Decisions.

An advertisement, bid and acceptance make a complete agreement for a lease.—*Cochrane v. Justice Co. 16 Colo. 415.* And the lessor cannot after such proceedings insist on new and arbitrary terms.—*Id.*

Under a mining lease covenanting to pay a certain royalty and that it shall amount to at least a given sum, lessees are not liable if after full testing no merchantable ore is found.—*Gibben v. Atkinson. 15 M. R. 428; 31 N. W. 570.*

Whether a lease has been extended is a question of fact which the Court cannot take away from the jury.—*Riddle v. Mellon, 23 Atl. 241.*

A tenant cannot take leases of two hostile titles and then compel his lessors to interplead.—*Standley v. Roberts, 59 F. 836.*

A lessee attempting to relocate the ground forfeits all rights under his lease.—*Silver City Co. v. Lowry, 57 P. 11; Affd. 179 U. S. 196.*

A lease of a mining shaft means not only the shaft but the ground acessible through such shaft.—*Wesling v. Kroll, 47 N. W. 944.*

The receipt of royalty admits the validity of the lease.—*Bicknell v. Austin Co. 62 F. 432; Burkhard v. Mitchell, 16 Colo. 376.*

Waiver of conditions may be shown by parol.—*Equator Co. v. Guanella, 18 Colo. 548; Bullis v. Noyes. 12 S. W. 397.* And release of Royalty.—*Crawford v. Bellevue Co. 38 Atl. 595.*

Changing terms of royalty in written lease by parol is valid and not within the Statute of Frauds. —*Nonamaker v. Amos, 76 N. E. 949; 73 Oh. St. 163.*

Oil and Gas Lease.

Follow form on p. 285 to end of first paragraph.

OIL AND GAS LEASE.

TO HAVE AND TO HOLD unto the said lessee for the term of two years from date hereof and thereafter as long as oil or gas is found in paying quantities.

And in consideration of such demise the said lessee doth covenant and agree:

To sink at least one well on the demised ground to the depth of at least 1,000 feet unless oil or gas in paying quantities is found within a shorter distance.

And to complete such sinking within six months from the date of this lease.

In default of the completion of the well to the depth aforesaid or until oil or gas is found as aforesaid this lease shall at the option of the lessor become null and void and the demised premises shall become forfeit to the lessor; Provided always, That payment of $100 rent before the expiration of said six months shall allow another period of six months for such sinking.

To deliver as royalty to said lessor one-eighth part of all oil or gas found in and saved from said land.

As soon as oil or gas is found in paying quantities the lessee will forthwith procure and place on the premises tanks and pipes and all other necessary plants or fixtures to economically save the product of such well.

The lessee may sink as many wells as he sees fit, paying the same royalty, and shall have the right to subdivide the ground into lots or tracts and sub-lease the whole or any part of the demised premises and all fixtures are the property of the lessee or his sub-lessees with the right to remove during the term or within a reasonable time thereafter.

In case oil or gas is found in paying quantities the lessee will keep correct books of account showing the production of each well and the disposition of the proceeds thereof, which books shall be open to the inspection of the lessor or his agent during business hours at all reasonable times.

Delivery to any pipe line or responsible gas or oil buyer of the lessor's proportion of the products of the well with instructions to pay to lessor his one-eighth of the gross price shall be full compliance with the above covenant to pay royalty.

In case oil or gas is struck on any adjoining land within one hundred yards of the exterior boundary of the demised tract the lessee will on written request sink a well on the demised tract at the closest available point to such well unless a well has been already started within two hundred yards of such foreign well.

The lessor on his part doth covenant and agree that he will not sink or sell or lease for sinking or allow wells to be sunk on any land of the lessor within one-quarter mile of the point where lessee shall sink his first well.

Close with last two paragraphs on p. 287.

The above form merely suggests the principal points to be covered in leases of this character. The terms necessarily vary according as it may be a prospecting contract or a lease in a district already covered with derricks.

There is an implied covenant in every oil and gas lease for diligent sinking and working.—*Parish Fork Co. v. Bridgewater Co. 42 S. E. 655; Aye v. Philadelphia Co. 20 M. R. 177; 44 Atl. 555;* and also to prevent drainage by hostile wells in the vicinity.—*—Kleppner v. Lemon, 18 M. R. 404; 35 Atl. 109.*

And there are a series of decisions, based on what principle we are at a loss to know, but one following the other so as to have become established law, that the lessee has no estate in the oil or gas until actually discovered in his well.—*Venture Co. v. Fretts, 25 Atl. 732; 17 M. R. 543; Florence Co. v. Orman, 73 P. 628; Steelsmith v. Gartlan, 19 M. R. 315; 29 S. E. 978; Rawlings v. Armel, 79 P. 683.*

LICENSE.

The material distinctions between a lease and a license are that

1. A license is not exclusive.
2. It invests the licensee with no property in the mineral until it is severed from the ground.
3. It may be revoked at any time.
4. It is not transferable.

The above stated differences show that a license practically amounts to a mere privilege to work at the owner's will. It is a permission sufficient to defeat the charge of trespass but is not that property in the soil such as parties contracting on equal terms for permanent working naturally bargain for. On the other hand, it is usually granted without any, or for a nominal consideration.

It has been held that a lease which did not *bind the lessee to work* was a mere license.—*Wheeler v. West, 11 P. 871; 20 Id. 45; Collins v. Smith, 43 So. 838.* But these rulings would be indefensible if the party has gone into possession under the implied covenant to work. In every lease, verbal or written, reserving royalty, there is an implied

covenant to work (*See p. 291*) and the *express* obligation to work is not one of the distinctions between lease and license. The exclusive right to mine implies a lease and not a license.—*Cons. Coal Co. v. Peers, 87 N. E. 937; Stinson v. Hardy, 41 P. 116.*

An option to purchase with privilege to work is a license coupled with an interest; and after expenditures made is irrevocable.—*Hall v. Abraham, 75 P. 882.* The same where there are expenditures but no option.—*Hosford v. Metcalf, 84 N. W. 1054; 21 M. R. 198.*

The general nature of a license as distinguished from a lease or other like grant is stated in *Massot v. Moses, 3 S. C. 168; 8 M. R. 607; Doe v. Wood, 9 M. R. 182; 2 B & A. 724.*

1. Not Exclusive.

The owner may work himself, or allow others to work upon the same ground.—*Johnstown Co. v. Cambria Co. 9 M. R. 226; Woodside v. Ciceroni, 93 F. 1.*

2. Passes No Property or Vested Estate.

A license is authority for the temporary occupation of land or to enter upon and do particular acts in and about it. It creates no estate.—*Fuhr v. Dean, 26 Mo. 116; 6 M. R. 216.* After it is broken by licensee the rock in a quarry belongs to him.—*McKee v. Brooks, 20 Mo. 526.*

3. Revocability.

Although revocable the owner cannot arbitrarily oust the licensee without compensation for expenditures made.—*Bush v. Sullivan, 9 M. R. 214; 3 G. Greene, 344.* After a proper revocation the licensee has no title in what he continues to break and sever.—*Williams v. Morrison, 32 F. 177.* A license once given continues till revoked.—*Keeler v. Green, 12 M. R. 465; 21 N. J. Eq. 27.* An executed license (to build a ditch) amounts to a grant.—*De Graffenreid v. Savage, 47 P. 902.* After revocation further

working by licensee may be enjoined.—*Clark v. Wall, 79 P. 1052.*

4. Not Assignable.

Being only a personal privilege any transfer operates as a forfeiture.—*Dark v. Johnston, 9 M. R. 283; 55 Pa. 164.* But if the license imply a grant of the ore it may be assigned.—*Muskett v. Hill, 5 Bing. N. C. 694.*

By One Co-Tenant.

As to whether at all or to what extent the license of one or more of several co-tenants is valid, see *Job v. Potton, L. R. 20 Eq. 84; 14 M. R. 329; Tipping v. Robbins, 37 N. W. 427; Omaha Co. v. Tabor, 16 M. R. 184; 13 Colo. 41.*

PROSPECTING CONTRACT.

Much litigation has grown out of contracts of this kind owing to the loose manner in which they are generally undertaken and the strong inducements to shirk their obligations when a rich discovery has been made.—*Murley v. Ennis, 12 M. R. 360; 2 Colo. 300; Johnstone v. Robinson, 12 M. R. 396; 3 McCr. 42.*

The following form covers the legal points necessary to be guarded in this class of contract:

GRUB STAKE CONTRACT.

In consideration of provisions advanced to me by *Albert B. Roeder*, and of his agreement to supply me from time to time, as I may reasonably demand them, with tools, grub and mining outfit generally, and the sum of fifty dollars in hand paid, I agree to prospect for lodes and deposits in *Grand* County, *Utah*, and to locate all discoveries which I may consider worth the expenditure, and record the same in the joint names of said outfitter and myself, and in our names only, as equal owners.

My time and labor shall stand against his money, provisions, etc., as aforesaid. All expenses of survey and record shall be paid by the outfitter, and I agree to make no debts on account of this agreement. Work done on claims after record and before the expiration of this con-

tract shall be considered as done under this contract, and no charge for labor or time shall be made for the same. This contract shall stand good during the whole of the summer and fall of *1907* (expiring *Dec. 1st*) and during all of that period I will not work or prospect on my own account, or for any parties other than said outfitter.

Dated April 1, 1907. L. L. CRAPO.

I agree to the terms above stated.

ALBERT B. ROEDER.

Under the following form the prospector is allowed wages and takes a smaller interest in lodes found:

AGREEMENT of date *March 7*, A. D. *1907*, between *S. P. McGough, John F. Tully*, and *Arthur D. Bullis*, outfitters, and *C. H. Pickett*, prospector.

WITNESSETH, That said outfitters agree to pay to said prospector on demand seventy-five dollars ($75) for the purchase of tools and packing outfit. and twenty-five dollars ($25) for railroad fare and expenses from Idaho Springs to Creede, and to allow said prospector wages at three dollars per day for each secular day after arrival at that place, until *November 1, 1907*, unless this contract is rescinded by notice before that date, and to pay all expenses of surveys and records to be made under this contract, and for powder, fuse and other mining materials, if required by said prospector, to the extent of fifty dollars.

And in consideration of the premises, said prospector agrees industriously and to the best of his skill to prospect for lodes and deposits in the neighborhood of Creede camp, within the limits of Hinsdale, Rio Grande and Saguache counties, and to locate and record all discoveries which in his judgment are worth holding, in the joint names of all parties hereto—one-fourth interest to each.

And that he will use no company name and make no debts against his associates.

And that he will at least once each month report progress and all discoveries made, by letter to said A. D. Bullis.

All work done in development after record shall be considered as work done under this agreement.

And said prospector agrees further not to prospect on his own account nor for any other persons during the lifetime of this contract, and if at any time within one year thereafter he shall become interested by location or purchase in any claims on which he may have prospected under this contract, he will allow his associates to take an equal interest with himself on the same terms and at the same cost at which he has acquired such interest.

On final settlement full wages are to be allowed as above agreed, but said prospector shall be charged with his full fourth of any expenses over and above the sums herein expressed, and shall account and pay for all tools and supplies on hand when contract expires, if terminated on his notice; but shall keep such tools and supplies if contract

determined at outfitters' election, or by expiration of the full term limited, or by failure to remit proper charges monthly on demand. And the said prospector shall have no right to quit on notice until he shall have prospected two full months under this agreement.

Witness the hands and seals of said parties.

S. P. McGOUGH. [SEAL.]
JOHN F. TULLY. [SEAL.]
A. D. BULLIS. [SEAL.]
C. H. PICKETT. [SEAL.]

The contract does not require a seal, and is not within the Statute of Frauds, and therefore may be verbal.—*Murley v. Ennis, supra; Moritz v. Lavelle, 77 Cal. 10; 16 M. R. 236; Meylette v. Brennan, 38 P. 75; Raymond v. Johnson, 49 P. 492; Shea v. Nilima, 133 F. 209; Doyle v. Burns, 99 N. W. 195; Mack v. Mack, 81 P. 707.* There is an isolated contrary ruling in Nevada.—*Craw v. Wilson, 40 P. 1076. See Nevada Statutes, 1907, p. 370.*

The association is practically a partnership.—*Lawrence v. Robinson, 12 M. R. 387; 4 Colo. 567; Abbott v. Smith, 3 Colo. App. 265.*

If the outfitter neglect to furnish the agreed and necessary supplies, such failure may be treated as a condition precedent, and the prospector is at liberty to search for mineral upon his own account.—*Murley v. Ennis, supra; Miller v. Butterfield, 17 M. R. 222; 21 P. 543.*

Where a prospector made locations which he concealed from his outfitters, and afterwards sold, he was compelled to account for the outfitters' share of the price.—*Jennings v. Ricard, 15 M. R. 624; 10 Colo. 395.* But he was not held in this instance to account to outfitter for any share in a lode, the float of which he discovered while prospecting, but did not find the lode till afterward. Of course, the rule in such cases must vary according to the facts and the good faith in the premises.

Where an association for prospecting purposes is abandoned, the several late partners may perfect locations on discoveries made on their several account.—*Page v. Summers, 15 M. R. 617; 70 Cal. 121.* If one of the associates quit before mineral is struck he cannot claim an interest in the perfected location.

—*McLaughlin v. Thompson, 29 P. 816.* Delay to assert an interest in the discoveries is fatal.—*Cisna v. Mallory, 19 M. R. 227; 84 F. 851.*

When the discoverer points out the place for location upon a verbal arrangement with the second party to take up the claim for their joint benefit and the second party excludes the discoverer from the location there arises a resulting trust in favor of the discoverer.—*Stewart v. Douglass (Cal.), 83 P. 699.*

Where a defendant located a claim in his own name and sold it to a company for stock, being under prospecting contract with plaintiff, plaintiff is entitled to his share of the stock upon payment of his share of the expenses.—*Mack v. Mack (Wash.), 81 P. 707.*

As to the degree of proof necessary to establish the contract compare *Rice v. Rigley, 20 M. R. 553; 61 P. 290,* and *Morrow v. Matthew, 79 P. 196.* The consideration must be adequate. Fifty dollars is not enough to outfit a prospector from California to Alaska.—*Prince v. Lamb, 20 M. R. 419; 60 P. 689.*

Permission by the owner to prospect his ground must be exercised within a reasonable time.—*Cahoon v. Bayaud, 1 N. Y. Sup. 814.* But in *Woodside v. Ciceroni, 93 F. 1,* the license was construed as perpetual. On contract to prospect and test land for mineral value, for what amounts to sufficient search, see *Wells v. Leek, 25 Atl. 101; Jamestown Co. v. Egbert, Id. 151; Petroleum Co. v. Coal Co. 18 S. W. 65.*

The use of a witchhazel rod to test for ore not allowed as proof; the party agreeing to prospect is bound to sink.—*Berry v. Frisbie (Ky.), 86 S. W. 558.*

WORKING CONTRACTS.

A contract to sink a shaft does not necessarily imply that the vein will be followed.—*Buckeye Co. v. Carlson, 66 P. 168.* The contractor is not bound to timber where the contract is silent on that point.—*No. 5 M. Co. v. Bruce, 3 M. R.-146; 4 Colo. 293.*

Nor to furnish packer and tubing on contract to sink an oil well. *Collier v. Munger, 89 P. 1011.*

Contract to sink to bed rock is complete without disclosing bed rock along the whole bottom of the shaft.—*Meehan v. Nelson, 137 F. 731.*

On a contract to sink on the vein where the vein disappears the contractor is not bound to go down through the country.—*Woodworth v. McLean, 11 S. W. 43.*

Measure of recovery where work on shaft was ordered stopped before completion.—*Mooney v. York Co. 45 Mo. 376.*

For breach of covenant by Lessee to furnish plant, drive tunnel, etc., see *Cleopatra Co. v. Dickinson, 68 P. 456.*

Where the mine is to furnish supplies to the contractor, on failure he may quit and sue for the work already done.—*Davis v. Brown County Co. 110 N. W. 113; Dignan v. Newlin, 82 S. W. 758.*

EXAMINATION OF TITLE.

The written title to a mining claim begins with the location certificate, after which the conveyances and incumbrances should appear on the abstract as in other classes of real estate.

Inspection and Survey.

In addition to the abstract of title a survey and local inspection are indispensable to security, especially when the claim is not patented.

This inspection and survey should result in ascertaining the depth of discovery shaft, and whether it shows a well defined crevice; whether the location notice was duly posted and what it contains (*p. 36*); whether the stakes were properly set; whether the claim (as far as such fact can be fairly ascertained) is laid so as to cover the apex or general course of the lode, and more especially what shafts, tunnels, prospect holes, stakes, notices and improvements, indicate the presence of hostile

claims; and if such intervening or overlapping hostile claims are found, their seniority or juniority should be established.

The abstract (at least until patent) may show a clear chain of title, and may be based on a record senior to other records on the same vein, and still the title may be absolutely worthless.—*Patterson v. Hitchcock, 5 M. R. 542; 3 Colo. 533.*

An adverse senior discovery may exist within a few feet of the discovery of the claim under examination. Every hole or stake in proximity to the claim should be examined, its history traced, and the possibility of danger from that source guarded against.

Whether the annual labor has been done should also be ascertained.

Such inspection having been made, the course of examination will be as follows:

1.—THE ABSTRACT.

The abstract should be certified by the recorder or by some reputable abstract firm, to contain all deeds and instruments filed or recorded, in the office of the recorder, conveying, encumbering or in any manner affecting title to the property in question.

The abstract, however, amounts to nothing more than a guide or memorandum to the attorney in his examination. Each deed and other instrument should be inspected at length, either by the original, by the record or by a certified copy.

The abstract should be furnished by the vendor at his own charges.

2.—LOCATION CERTIFICATE.

The material points to be observed in the location certificate are that it contains all that is required by the terms of A. C. Section 2324 and by the statute of the particular State: *antę p. 60.*

3.—CONVEYANCES.

A mine is conveyed by deed or encumbered by mortgage the same as other real estate.

The description should contain

1. The name of the lode.
2. If patented the number of the survey lot.
3. Mining district, County and State.

Placer claims are usually described by their names, or if patented by the names and number of the survey lot. In early locations they were usually numbered with reference to the local gulch.

Deeds by Married Women.

The separate acknowledgment by a married woman is not required in Colorado, but where required in any State, such acknowledgment is generally essential to pass the wife's title, and is not merely a mode of proof of the delivery of the deed which is the usual function of an acknowledgment. *See p. 274.*

After Acquired Title.

A warranty deed conveys to the grantee any after acquired title of his grantor, and even a quit-claim made pending application, may carry the patented title to the grantee.—*Crane v. Salmon, 41 Cal. 63; Bradbury v. Davis, 3 M. R. 398; 5 Colo. 265.*

4.—PATENTS.

Where the claim is patented the Patent should appear in the Abstract although failure to record the patent is not the same as a like failure in case of a deed, a certified copy of the patent being always procurable from the General Land Office. The patent carries the title back to the entry at least.—*Benson Co. v. Alta Co. 145 U. S. 428.*

The form of patent is quite different from that of a patent for agricultural lands, and contains specific exceptions as to easements, etc., and in the form used before 1888 and in instances since that date a plat of the survey; and excepts the surface

ground of any previous entry crossing the line of the lot conveyed.

Where such exclusions occur the patentee has no claim to the vein in such excluded area. And in instances the date of application and of entry or even the discovery may continue to be material where the question of relation arises. *See p. 140.*

Where a patent has been issued there is no necessity for a strict examination of the location certificate or of the various acts of location. It cures all defects incident to the location and in most instances any formal break in the chain of title prior to the application. And especially it cuts out prior hostile titles which have failed to adverse or to successfully maintain their adverse.

But it does not divest the title of a co-tenant dropped in the patent application (*see p. 127*), or at least it may be possible for a party having a claim to an interest in the possessory title to prove an equity such as would make the patentee, trustee of the title for his use. Nor does it dispense with the importance of a surface examination to see that the corners agree with the plat and that the survey lot substantially encloses the vein.

5.—PLAT OF PATENT.

In the older form of patents was inserted a diagram in which the ground conveyed was colored. Where the patent contains no such plat a certified copy should be obtained from the Surveyor General's office, and a comparison of the plat made with the metes and bounds contained in the description and the exclusions, if any, recited in the patent.

6.—LIENS.

A patent does not divest liens accrued against the possessory title. They are especially saved by the terms of R. S. § 2332.

A judgment not becoming a lien until a transcript of the same has been recorded such lien will show on the Abstract. But there may be a lien

which would not so show, by judgment in a Federal Court in any County where Federal Courts are held.

There is also a class of possible liens which have to be the subject of parol inquiry, such as mechanics' liens, liens in favor of the state on an audited account or for fine or costs or suretyship in criminal cases.—*R. S. Colo. Secs. 2009, 2010.*

7.—PARTIES IN POSSESSION.

If parties are in actual possession, claiming adversely to the grantor, or claiming under him as lessees, their possession is an assertion of their claim, whatever it may be, of which the purchaser must take notice at his peril.—*Coffee v. Emigh, 15 Colo. 184.*

8.—CONCLUSION.—DUTY OF COUNSEL.

If from the abstract, or from any of the certificates, or from inspection of any deed, instrument or record in the chain of title; or as the result of his client's inspection and survey of the premises, or from any other source, the attorney is informed of any adverse title, or of any outstanding trust or adverse interests, or of any missing conveyance in the chain of title, or of any serious defect in the body or acknowledgment of any instrument of such a nature as to invalidate the title—the true condition of such title should then, with due secrecy, be expressed to the client. And when the attorney has satisfied his own mind upon all such questions of law as may have arisen during the course of his examination, the client has a right to be advised of all points which remain in doubt, and of any contingencies which may threaten the quiet enjoyment, or would obstruct a sale of the premises; and of all steps which if presently taken may avoid such conditions and perfect the title, so that the true value of the title in law shall be represented to the client, that is, the intending purchaser. For in all cases of examination of title, the attorney should be selected, or at least assented to, by the purchaser,

if it be a sale; by the lender of money, if it be a mortgage; because from the necessity of the case, he acts in the interest of the purchaser and of the lender, and not in that of the grantor or of the mortgagor; the charge for his examination should be made against the same side; the charge for the conveyance, on the other hand, is by custom made against the vendor.

ALIENS.

Ownership of Patented Title.

The right of aliens, resident or non-resident, to acquire title to patented property, depends upon the local legislation which in general fully provides for such ownership. The Colorado Statute (R. S. Chap. 3, and art. 2, sec. 27, of the Constitution) allows ownership by either resident or non-resident aliens.

A patent to the use of an alien may not be attacked except by direct governmental inquisition.—*Justice Co. v. Lee, 21 Colo. 260.*

Ownership of Possessory Title.

The Mining Acts throw open the public domain to citizens only and to those who have declared their intentions to become citizens.—*A. C. § 2319.*

It would seem from their language that an alien could not locate a claim and if he could not locate, his holding by deed and perhaps by devise or descent might be questioned.

But the matter in its practical importance is controlled by the rule laid down in opinions of the Federal Supreme Court, *Manuel v. Wulff, 152 U. S. 505; McKinley Co. v. Alaska Co. 183 U. S. 563,* that the question of ownership by an alien is a matter between himself and the government and that as long as the Government does not make inquisition to deprive him of his title, or become a party to proceedings to perfect the title, his title even when

he claims under his own location is good against all the world.

Adverse Claim Cases.

As the Government rarely initiates such proceedings the alien in contest with a citizen has therefore the same standing as the citizen (*Tornanses v. Melsing, 109 F. 710*) save only on application for patent and in suits supporting adverse claims, in which proceedings the Government is an interested party and the citizenship of the parties becomes material.

If the parties to such suit are citizens the fact that the locator was an alien or that one of several locators was an alien or that intermediate holders were aliens becomes wholly immaterial.—*North N. Co. v. Orient Co. 9 M. R. 530; 1 F. 522; Providence Co. v. Burke, 57 P. 641; Gorman Co. v. Alexander, 51 N. W. 346; Billings v. Aspen Co. 52 F. 250; Stewart v. Gold Co. 82 P. 475.*

The Citizenship of the Original Locator is material only where he continues to be the claimant to the time of the institution of the adverse suit.

Declaration of Intention.

One who has declared his intention to become a citizen of the United States may locate, enter and patent a claim the same as a citizen. No fixed period of previous residence is required before making such declaration.

The Act of Naturalization Is Retroactive, so that if an alien has located a claim and afterwards became or declared his intention to become naturalized, his location is good from its original date.—*Osterman v. Baldwin, 6 Wall, 122; 29 L. D. 164; Shea v. Nilima, 133 F. 209.*

In the last cited case a prospecting contract between two parties, both aliens, was enforced.

In the *Manuel* case a citizen had located and sold to an alien. The alien had applied for patent

and was adversed. Pending trial he became naturalized, he being a minor emigrant entitled to take out papers without previous declaration of intention, and the Court held that the effect of naturalization was retroactive, made his claim valid and defeated the adverse.

Children of Aliens.

There is a common impression that the naturalization of the father operates to make citizens of all his children who came to the United States under twenty-one years of age; but this is the case only as to such children who were under that age at the date of the father's naturalization papers.—*R. S. § 2172; 34 St. L. 1229.*

An Alien May Take Title by Descent and hold the claim against all the world except the United States.—*Billings v. Aspen Co. 51 F. 338; 52 F. 250; Lohmann v. Helmer, 104 F. 178.*

Pleading and Proof of Citizenship.

Except in adverse claim cases it need be neither alleged or proved.—*Harris v. Kellogg, 49 P. 708; Buckley v. Fox, 67 P. 659; Gruwell v. Rocco, 74 P. 1028.* It may be proved when essential though not averred.—*Altoona Co. v. Integral Co. 45 P. 1047.* Where no issue is made on it, it cannot be controverted.—*Jackson v. Dines, 13 Colo. 90; Sherlock v. Leighton, 63 P. 934.*

Indirect proof by circumstances has been allowed.—*Strickley v. Hill, 62 P. 893,* and in *Jantzen v. Arizona Co. 20 P. 93,* the broad view was expressed, and as we have always believed correctly expressed, that (in judicial as distinguished from departmental proceedings) a presumption exists in favor of the citizenship of a resident locator.

The point of alienage must be raised on the trial below.—*O'Reilly v. Campbell, 116 U. S. 420.*

Where a party is native born his own statement proves his citizenship. Where naturalization or declaration of intention is in issue the proper proof

is the production of a certified copy of the record, but there are instances where this strictness is not insisted on.—*Wood v. Aspen Co. 36 F. 25; Providence Co. v. Burke, 57 P. 641.*

In the Land Office upon application for patent and upon adverse claim the proof is by affidavit and like proof is held good in the suit supporting the adverse.—*Hammer v. Garfield Co. 16 M. R. 125; 130 U. S. 291; O'Reilly v. Campbell, 116 U. S. 420.*

Citizenship of the stockholders of an American corporation need not be proved and issue cannot be taken on this point.—*Doe v. Waterloo Co. 70 F. 456.*

The Federal Alien Act of March 3, 1887, is in force in the Territories only. The Act (Sup. 556) forbids aliens who have not declared their intentions, to hold any real estate patented or possessory, except by inheritance or as creditors buying to protect debts. It applied also to corporations where over 20 per cent. of their stock was held by aliens; but this restriction was removed by the Act of March 2, 1897, *29 St. L. 618*, so that now a corporation not alien may purchase from the Government irrespective of the citizenship of its stockholders.—*28 L. D. 178.* By the same amendment it allows aliens to acquire and hold by purchase, possessory as well as patented mining claims. Its language is so vague that it cannot be told without judicial construction whether it would allow of the original location of a mining claim by an alien. Except as affected by the Alien Act or by local statute, Chinese or other aliens can work under lease from a citizen.—*Ah Kie v. McLean, 32 P. 200.*

MEXICAN GRANT.

The three cessions of Mexican territory to the United States were by the treaty of Guadaloupe Hidalgo, Feb. 2, 1848, the Gadsden purchase in 1853 and the grant by the State of Texas in 1850, of all

its claims to territory outside of its present boundaries. It had been the policy of the Spanish and Mexican governments to allow the governors of the outlying provinces to pass title to large tracts for colonization purposes but limited to eleven square leagues. Such private cessions of land are recognized by all the treaties as well as by the modern law of conquest, and they have been variously confirmed by special Acts, by patents, or by the adjudication of the Court of Land Claims. Many of the so-called grants were of an inchoate character—what we would call licenses or equities not ripened into grants proper. But whatever their status the U. S. is understood to be bound as fully as was the original government.

In *Moore v. Smaw, 12 M. R. 418; 17 Cal. 199*, where the subject of mineral rights in grants was fully discussed, it was held that no interest in minerals passed by the grant of the Mexican government without express words designating them and that at the date of the cession of California to the United States they were the property of the Mexican government and passed by the cession of the United States; but that a patent from the United States, in confirmation of such grant, making no reservation of the minerals, invested the patentee with the ownership of the minerals.

In *Fremont v. U. S. 17 How. 565*, it was held that the discovery of gold or silver did not, under the mining laws of Mexico, destroy the title of the individual holding the grant to the surface, without passing upon the rights of the government or of the discoverer, in such minerals.

The *Moore case* followed without qualification in *Fremont v. Seals, 11 M. R. 632; 18 Cal. 433*, and *Ah He v. Crippen, 10 M. R. 367; 19 Cal. 492*, remained for many years unquestioned, but in *U. S. v. San Pedro Co. 17 P. 337*, the Supreme Court of New Mexico held that a confirmation of the grant by patent or statute did not pass the minerals. The facts in this case for the mineral claimant were very strong, as the mines on that grant had been, prior

to the cession, of known value and denounceable, if not actually denounced under Mexican law.

A Mexican grant seems to be inadmissible as proof of title till confirmed by Act of Congress.—*Astiazaran v. Santa Rita Co. 20 P. 189; 148 U. S. 80.* But confirmation may be complete without patent.—*Shaw v. Kellogg, 170 U. S. 312.* And the action of Congress is not subject to judicial review.—*Catron v. Laughlin, 72 P. 26.*

A mining location may be made on an unconfirmed Mexican grant. Such land is not reserved against entry.—*Lockhart v. Wills, 54 P. 336; Aff'd 181 U. S. 516.*

In *Gildersleeve v. New Mexico Co.* a confirmed Mexican grant was upheld on the ground of laches of the complainant.—*161 U. S. 573.*

MINING CORPORATIONS, DOMESTIC.

A Corporation is an "association of persons" within the meaning of the U. S. Mining Acts.—*U. S. v. Trinidad Co. 137 U. S. 160.*

*Any three or more persons are authorized to file their certificate of incorporation under the Colorado Incorporation Act.—*R. S. §§ 845-999*, for purposes of mining or construction of ditches or flumes; to run tunnels; or in fact "for any lawful purpose," but there are special provisions in the corporation chapter which refer only to mining, ore reduction, and tunneling companies—and other special provisions concerning ditch, flume and pipe line companies.—§§ 988, 998.*

*These details vary in the several States and Territories, but each allows of incorporation upon practically the same terms and upon compliance with substantially the same forms as in Colorado. To state each instance where they vary would be beyond the plan and intended size of this work. Nor is it advisable even where the most complete local forms and directions are given in any book to attempt to write any such document as a corporate charter without professional counsel.

The Number of Directors of a Mining Company shall not be less than three nor more than nine. *R. S. § 977.* Section *865* which makes the limit thirteen is generally supposed to not apply to mining corporations.

The Par Value of Shares cannot be less than one dollar nor exceed one hundred dollars, and the shares may be issued payable in instalments.—§*850.*

The Directors have power to sell the Stock of the Company at less than par.—*Mosher v. Sinnott, 79 P. 742.*

Rights of Stockholders.

Any stockholder has a right to inspect the books of the corporation.—§ *869.* And the holders of fifteen per cent. may demand a written statement.—§ *877.* But there is no Statute allowing stockholders the right to examine the mine.

The Term of Existence cannot exceed twenty years.—§ *847.* But may be revived.—§ *891.*

Stock Paid in Lands.

Any such company may issue stock in payment for mines, such stock to be treated as paid-up stock. —§ *851.*

Where stock is issued upon excessive overvaluation the holder may be held personally liable.—*Kelly v. Fourth Co. 53 P. 959;* compare *DuPont v. Tilden, 42 F. 87.*

No personal liability is imposed upon stockholders for debts, except to the extent of unpaid stock held by them.—§ *873.* Directors and officers become liable for failure to make and file an annual report; or for declaring fraudulent dividends.—§ *911, 872.*

Sale to corporation of claims located without discoveries held to be without consideration and the stockholders personally liable.—*Buck v. Jones, 70 P. 951; 22 M. R. 467.*

Annual Meetings of Stockholders are provided for by Statute, the By-Laws fixing the time and place. They cannot be lawfully held out of the State.—*Jones v. Pearl M. Co. 20 Colo. 417.*

The Colorado Act (*R. S.* § *865*) requires notice to be published not less than ten days previous to the meeting, in a newspaper published where the principal office is kept, and thirty days' notice to each stockholder.

Mortgage.

In Colorado a mining company is forbidden to mortgage its property except by a majority vote of its Stockholders.—§ *865.*

Other States have similar limitations. Either previous assent or subsequent ratification answers the demands of such Statute.—*Lacy v. Gunn, 78 P. 30.*

Corporate Deed.

The seal of the Company is prima facie evidence that it was affixed by corporate authority.—*Union Co. v. Bank, 2 Colo. 226.* To render a conveyance of real property unimpeachable it should be authorized by the Board of Directors, preceded by action of the stockholders at a meeting called for that purpose. But the deed may be valid without such minutes.—*Rubie Co. v. Princess Co. 71 P. 1121.*

Seal.

A corporation may be bound by a scroll seal.—*G. V. B. Co. v. Bank, 95 F. 23.* And may adopt new seal when its president withholds the old one.—*Socorro Co. v. Preston, 40 N. Y. S. 1040.*

ARTICLES OF INCORPORATION—MINING COMPANY.

WHEREAS, *Franklin R. Carpenter, Elbert F. Fitzgerald and Frank W. Howbert,* all of the City and County of *Denver,* State of *Colorado,* have associated themselves together for purposes of incorporation under the General Incorporation Acts of the State of Colorado, they do therefore make, sign and acknowledge these *duplicate* certificates in writing, which when filed, shall constitute the Articles of Incorporation of *The Yellow Bug Mining Company.*

ARTICLE 1. The name of said company shall be *The Yellow Bug Mining Company.*

ARTICLE 2. The objects for which said Company is created are to acquire, hold, work and operate mines and lodes bearing gold, silver and other associated minerals in the County of San Miguel in said State of Colorado; and to acquire, own and use water, water rights and mills incident to the extraction, treatment and reduction of the ores of said metals and, from time to time, to sell and convey such mines, mills, water rights and ores, and to do all things incident to the general business of mining and to market and treat the product of the mines.

ARTICLE 3. The term of existence of said company shall be twenty years.

ARTICLE 4. The capital stock of said company shall be *one hundred thousand dollars* divided into *one hundred thousand* shares of *one* dollar each.

ARTICLE 5. The number of directors of said company shall be *three*, and the names of those who shall manage the affairs of the company for the first year of its existence are *Franklin R. Carpenter, Elbert F. Fitzgerald* and *Frank W. Howbert.*

ARTICLE 6. The principal office of said company shall be kept at *Placerville* in said County and the principal business of said company shall be carried on in said County of *San Miguel.*

ARTICLE 7. The stock of said company shall be non-assessable.

ARTICLE 8. The board of directors shall have power to make such prudential by-laws as they may deem proper for the management of the affairs of the company, not inconsistent with the laws of this State, for the purpose of carrying on all kinds of business within the objects and purposes of such company.

In witness whereof, the said incorporators have hereunto set their hands and seals this *first* day of *January*, A. D. *1908.*

FRANKLIN R. CARPENTER. [SEAL.]
ELBERT F. FITZGERALD. [SEAL.]
FRANK W. HOWBERT. [SEAL.]

STATE OF COLORADO, City and County of *Denver:* ss.

I, *Arthur R. Morrison*, a notary public in and for said County, do hereby certify that *Franklin R. Carpenter, Elbert F. Fitzgerald* and *Frank W. Howbert*, who are personally known to me to be the same persons described in, and who executed the within duplicate Articles of Incorporation, appeared before me this day and personally acknowledged that they signed, sealed and delivered the same as their free and voluntary act and deed.

Witness my hand and notarial seal this *first* day of *January*, A. D. *1908.* *Arthur R. Morrison*,
[SEAL.] Notary Public.

Where it is desired to transact part of the business out of the State the certificate must so state:

ARTICLE 9. A part of the business of said Company shall be carried on in *Eckley*, County of *Luzerne*, Commonwealth of *Pennsylvania*, and the principal office of said Company out of the State shall be at said *Eckley*, at which office meetings of directors may be held.

The first seven articles in the above form contain all the statutory requirements. Article 8 in regard to the by-laws, is necessary if it is intended that the directors instead of the stockholders, shall make the by-laws.—*R. S.* § *853*.

One of the said duplicates is to be filed with the Recorder of the proper county, and one with the Secretary of State, and if the business is to be carried on in more than one county, the word *duplicate* should not be used, as there must be an original for each county as well as for the Secretary of State.

Assessable or Non-Assessable.

The statute provides for assessments upon shares, where, by the charter the stock is made assessable, and requires that whether the stock shall be assessable or non-assessable shall be stated in the articles; and each certificate of stock "shall have plainly printed on the face thereof the word 'assessable' or 'non-assessable' as the case may be."

Where, after organization complete, a company desires to extend its business into other counties, it may do so without amending charter, by filing certified copy from the Secretary of State's office with the Recorder of the new county.

On filing the articles a copy certified by the Secretary of State should be procured and preserved as the legal voucher for corporate existence: at the same time the Secretary of State issues his "Certificate of Authority" under the Act of 1901, and, thereupon should be called the organization meeting, to be attended by a majority of the original Board of Directors (by custom the same persons as the incorporators, though not necessarily so). This organization meeting, so-called, is really the first regular meeting of the Board of Directors, and at such

meeting the articles filed should be formally accepted.

ORGANIZATION MEETING.

Record of first meeting of the Board of Directors of *The Yellow Bug Mining Company*, at *Placerville*, Colorado, *January 7, 1908*.

At a meeting of the persons named in the articles of said Company, there being present *Franklin R. Carpenter, Elbert F. Fitzgerald and Frank W. Howbert.*

On motion *Franklin R. Carpenter* was elected chairman and *Frank W. Howbert*, secretary *pro tem.*

On motion the Articles of Incorporation as filed in the office of the Secretary of State and in the office of the County Clerk of *San Miguel* County, were accepted as the articles of incorporation, or charter of said company.

On ballot taken *Franklin R. Carpenter* was elected president of the company, *Elbert F. Fitzgerald* was elected vice-president, *Frank W. Howbert* was elected treasurer. *Albert B. Roeder* was elected secretary, and *Elias Stephan* was elected superintendent.

On motion the following by-laws were adopted:

*BY-LAWS.

I—OFFICERS.

The officers of this company shall consist of a President, Vice-President, Secretary, Treasurer, and Superintendent, who shall be chosen by the Directors at their first meeting following the annual meeting of the stockholders in each year. They shall be elected from the Board of Directors, except the Secretary and Superintendent, who may or may not be Directors. Said officers shall hold their respective offices until their successors are appointed and enter upon the duties of their offices. Vacancies among the Directors may be filled at any meeting of the Board of Directors, by ballot.

II—DUTIES OF PRESIDENT.

It shall be the duty of the President to preside at all meetings of the Directors, and to sign all bonds, deeds, agreements or other instruments in writing, made or entered into by or on behalf of the corporation; to sign all certificates of stock, and all orders for money on the Treasurer, and in general, perform all acts incident to his office.

III—DUTY OF VICE-PRESIDENT.

It shall be the duty of the Vice-President to perform all such functions as belong to the office of President in the absence of the President.

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*The above by-laws will be found, in general, sufficient; but each by-law should be reviewed and such changes made as may be needed to cover special plans of the incorporators.

IV—DUTIES OF SECRETARY.

The Secretary shall give due notice of all meetings of stockholders, and of the Board of Directors; shall prepare and keep proper books of record and of account for the business of the company, and such other books as may be required by law or the Directors may prescribe. He shall countersign and register all certificates of stock, and other documents requiring the signature of the President, attaching the corporate seal of the company to all instruments requiring seal, and perform all such other duties as are incident to his office. A suitable compensation, to be determined by the Directors, shall be allowed the Secretary for his services. He shall be the custodian of the corporate seal.

V—DUTIES OF TREASURER.

The Treasurer shall be the custodian of the funds until the same be disposed of by order of the Board of Directors. He shall give bond satisfactory to the Board of Directors, for the faithful performance of his duties. No money shall be paid out by the Treasurer except on the order of the President or Superintendent, countersignd by the Secretary.

VI—DUTIES OF SUPERINTENDENT.

The Superintendent shall have control of the working and developing of the company's mining property; shall report to the Board of Directors, for their approval, all contemplated work, and after such approval, shall have full power to contract said work. All expenses incurred by the Superintendent in the working and management of the company's property shall be borne by the company. A suitable compensation, to be determined by the Board of Directors, shall be allowed him for his services.

VII—BOARD OF DIRECTORS.

The Board of Directors shall consist of *three* members, always including the President, Vice-President and Treasurer. It shall be the duty of the Board to exercise general supervision over the affairs of the company; to receive and pass upon the reports of the Secretary, Treasurer and Superintendent, to audit all bills and accounts against the company, and to direct the Secretary in correspondence.

VIII—ANNUAL REPORTS.

The Board of Directors shall cause its officers to make a full exhibit of their several departments and to prepare reports for submission to the annual meeting of stockholders.

IX—DIRECTORS' MEETINGS.

The Board of Directors shall meet at such times as they shall from time to time determine, and a meeting of the Board may at any time be called by the President or any two members of the Board by causing personal notice

to be served upon the Directors at least one day before the date of such proposed meeting. *Two* of the Directors shall constitute a quorum for the transaction of business. All Directors and officers must be stockholders.

X—STOCKHOLDERS' MEETING.

The first annual meeting of the company shall be held at the office of the company at Placerville, at 10 o'clock A. M., on the second *Tuesday* in *January, A. D. 1909*, and on the same Tuesday of each succeeding year. If omitted, the Directors shall hold over until their successors are appointed. Special meetings may be called by the Board of Directors, or by one-tenth in amount of all the stock held. Such published notice and personal notice by mail as may be required by law, shall be given of each meeting (except adjourned meetings) and the object of the meeting shall be stated in the notice. Stockholders may be represented by proxies, which must be exhibited for inspection to the meeting.—*See* § 865.

XI—CERTIFICATE OF SHARES.

The subscribers to the capital stock of this company shall be entitled to certificates of their shares, duly signed by the President and countersigned by the Secretary. The certificates of stock shall be numbered and registered as they are issued. Transfers of stock shall only be made on the books of the company, either in person or by attorney, and the possession of stock shall not be regarded as evidence of ownership of the same, unless it appears upon the stock books of the company that said certificate was issued or duly transferred to the holder of the same.

XII—DEBTS.

No debt shall be contracted against the company except by order of the Board of Directors.

XIII—DIVIDENDS.

Dividends shall be made not in excess of the net earnings of the company at the close of every fiscal year, which shall be on the thirty-first day of December of every year; or oftener as the Board of Directors may see fit.

XIV—CORPORATE SEAL.

This company adopts as its corporate seal, the device described as follows: A pick and shovel crossed, surrounded by the name of the company.

XV—AMENDMENTS.

These by-laws may be changed, amended or revoked at any time, by a two-thirds vote of the Board of Directors.

The charter and by-laws being adopted, and the officers elected, the organization of the corporation

is complete, and the minutes proceed to note business as it may be transacted.

Reports and Certificates Required.

After payment of the last instalment of capital stock the President and a majority of the Board of Directors are required by § 875 to record a certificate in the office of the Secretary of State as follows:

CERTIFICATE OF FULL PAID STOCK.

STATE OF COLORADO, County of *San Miguel:* ss.

The undersigned, *Franklin R. Carpenter*, President, and *Elbert F. Fitzgerald*, Director, constituting a majority of the Directors of *The Yellow Bug Mining Company*, do hereby certify, in accordance with Section 875 of the Revised Statutes of said State that the amount of the capital stock of said company, as fixed and limited by its Articles of Incorporation, is $100,000, and that the whole amount of said stock has been paid in. That $10,000 thereof was paid in cash and $90,000 was paid for by the purchase of mining property.

Witness our hands this *5th* day of *February*, A. D. *1908*.

FRANKLIN R. CARPENTER, President.
ELBERT F. FITZGERALD, Director.

STATE OF COLORADO, County of *San Miguel:* ss.

Franklin R. Carpenter and *Elbert F. Fitzgerald*, being duly sworn, say that they are the officers named in the foregoing certificate, and constitute a majority of the Board of Directors of said company; that they have heard said certificate read and know the contents thereof, and that the matters and things therein stated are correct and true.

FRANKLIN R. CARPENTER.
ELBERT F. FITZGERALD.

Sworn and subscribed before me this *fifth* day of *February*, A. D. *1908*.

Curtis L. Greenwood,
[SEAL.] Notary Public.

A *copy* of said certificate is also to be filed and recorded in the Recorder's office of each county where business is done.

It is held that when the capital stock is fully paid up it is the duty of the officers to make and record such certificate.—*Austin v. Berlin, 13 Colo. 200.*

Annual Report.

By *Colorado Revised Statutes* § *911*, an annual report is required to be filed in the office of the Secre-

tary of State within 60 days from January 1st. The Penalty for failure is personal liability of all officers and directors. The Act requires information and items in detail never previously exacted and while the following form is for its own facts in strict compliance with the Statute, the Act is so worded that its terms must be studied with reference to the status of each corporation when about to comply or attempt to comply with its obscure and inquisitorial demands.

ANNUAL REPORT OF MINING CORPORATION.

In compliance with the terms of Section 911 of the Revised Statutes of the State of Colorado, *The Rough Rider Mining Company* makes and files this annual report, and says:

1. The names of its officers and Directors and their several places of residence, together with the street or business address of such officers and Directors, are as follows:

President and Director, George C. Buell, of Pittsburg, Pennsylvania.

Vice-President and Director, Geo. W. Kretzinger, of 1036 Monadnock Block, Chicago, Ill.

Treasurer and Director, Thomas Lambie, of 2012 Larimer street, Denver, Colorado.

Secretary, Wm. Byrd Page, of No. 932 Equitable Building, Denver, Colorado.

Superintendent or Manager. Thomas B. Crawford, of No. 818 Marion Street, Denver, Colo.

2. The amount of its capital stock as fixed and determined by its Articles of Incorporation (and amendments thereto) is $100,000.

3. The proportion of such capital stock actually paid in is $100,000, of which $25,000 was paid in cash, and $75,000 was paid by purchase of mining property.

4. The amount of the indebtedness of said corporation at the date of filing this report is $5,000.

5. Said Corporation is now engaged in the active operation of its business within the State of Colorado.

6. It has no personal property except tools, supplies and office furniture. It has twenty men on pay-roll, and is working a producing mine with no lien encumbrance.

7. The property of said Corporation within this State is located in the County of Park, and consists of two Lode Mining Claims, of which the Roosevelt is held under letters patent of the United States, and the Colonel Wood is held by possessory right on the public domain.

8. The amount of work done and improvements made on said property since the time of filing its last annual report is $20,000, expended in new hoisting plant and the development and working of its mines.

Witness the corporate name and seal of said Company, at the hand of its President, this 4th day of January, A. D. 1908.

[SEAL.] THE ROUGH RIDER MINING COMPANY,
By GEO. C. BUELL, President.

Attest:
WM. BYRD PAGE, Secretary.

STATE OF COLORADO, City and County of *Denver:* ss.

Before me, the subscriber, a Notary Public, in and for said County, personally appeared *George C. Buell*, President, and *Wm. Byrd Page*, Secretary of *The Rough Rider Mining Company*, who being duly sworn, each for himself, saith that he has read the foregoing Report signed by said *Geo. C. Buell*, President, and that the same and the matters and things therein stated are true.

GEO. C. BUELL,
WM. BYRD PAGE.

Sworn and subscribed before me, this 4th day of January, A. D. 1908.

Arthur R. Morrison,
[SEAL.] Notary Public.

Other details are required for ditch companies and still others for coal mining corporations.

Such report must be signed by the President and verified by the President and Secretary and the corporate seal attached.

In either form where the stock has been paid up by purchase of the mine, the certificate must so state.

ARTICLES OF INCORPORATION—DITCH COMPANY.

Preamble same as *p. 315.*

ARTICLE 1. The name of said company shall be "The *Deluge* Ditch Company."

ARTICLE 2. The objects for which said company is created are to construct a ditch and keep and maintain the same *from the stream known as Roaring Fork of the Grand, tapping such stream at a point about one-quarter mile above the Jones ranch, and about one hundred yards below Eagle Cliff, and fifty feet northeast from lone pine tree blazed D. D.; the line of said ditch running thence (give course and distance of survey if possible, so as to describe "the line of said ditch as near as may be.")* The water of said ditch to be used and sold for placer mining.

ARTICLE 7. The stock of said company shall be assessable, upon majority vote at stockholders' meeting, as required by law.

ARTICLES 3, 4, 5, 6, 8 and 9 and acknowledgment same form as on *p. 316.*

The stream tapped, head of ditch, line of ditch and intended use of water must always be stated;

also the location of the reservoir if a reservoir is to be constructed.

Any surplus water they are compelled to keep for sale, at rates fixed by County Commissioners.

SMELTING AND ORE-SAMPLING COMPANIES.

The following Articles stating the purposes of organization are taken from records filed by operating companies. The other Articles for such or other like companies should be substantially in the above form, always observing that the article (No. 7) referring to assessability of stock, and the requirement to print "Assessable" or "Non-Assessable" on the face of the stock certificate is confined to ore-reducing, mining and tunneling companies.—§ 975.

(*The Pueblo Smelting and Refining Company.*)

ARTICLE 2. The objects for which the said company hereby formed is created shall be: To buy and sell ores, metals and other furnace products; to smelt and reduce lead, gold, silver, copper and other ores, and refine bullion; manufacture lead, copper and iron products and articles of merchandise, and do a general smelting, refining and metallurgical business; to erect necessary buildings, mills, machinery and appliances; purchase materials for the proper working thereof; and do any and all other things necessary, proper or requisite to carry into effect the objects aforesaid.

(*The Omaha and Grant Smelting and Refining Company.*)

ARTICLE 2. The nature of the business to be transacted shall be:

1st.—The purchase, lease, erection and operation of smelting and refining works, and the smelting and refining therein of gold, silver, and other valuable ores and metals.

2nd.—The purchase, lease and operation of mines and mining property, for the purpose of obtaining said gold, silver and other valuable ores.

3rd.—The purchase of gold, silver and other valuable ores and metals for smelting and refining, and the sale and disposal of the products thereof.

4th.—To acquire by donation, purchase, lease, or otherwise real or personal property of any kind, and to use, maintain, enjoy, and dispose of the same for the benefit of said corporation.

(*The Taylor & Brunton Ore Sampling Company.*)

ARTICLE 2. The objects for which said company is created are to acquire, hold and operate mills and works at and near Aspen, in said County of Pitkin, for the crush-

ing, sampling and testing of mineral-bearing ores; and to buy, sell, assay, hold, store, ship and deal in such ores and their products on its own account, and as factor or agent for others; and to do all things incident to the general business of maintaining and operating such mills and works, and dealing in all kinds of mineral-bearing ores and the products and proceeds thereof.

Filing Fees—Domestic Corporations.

On filing its Articles in the office of the Secretary of State each domestic corporation is required to pay $20 for the first $50,000 of its capital stock and 20 cents for each additional $1,000 of stock.

For Certificate of Authority, $5.

Filing impression of seal, $2.50.

On filing of certificate of paid up stock, $2.50, plus 5 cents for each $1,000 of stock in excess of $50,000.

On increase of capitalization, 20 cents for each $1,000.

Amendment of articles, $5.

Change of name, $25.

Filing Fees—Foreign Corporations.

$30 for the first $50,000 of its capital stock, and 30 cents for each additional $1,000 of stock.

Certificate of Authority, $5.

Filing impression of seal, $2.50.

Copy of law under which organized, $5.

Designation of agency, $5.

Filing certificate of paid up stock; same as for domestic corporation, supra.

On increase of capitalization, 30 cents for each $1,000.

Amendment of Articles, $5.

Change of name, $25.

License Tax.

By the Revenue Act of 1907 all corporations, domestic or foreign, are charged an annual license tax of two cents upon each $1,000 of their capital stock. The tax is payable to the Secretary of State on or before May 1st. The penalty for failure to pay the tax is a forfeiture of the right to do business in

the State, besides an addition of one-tenth to the tax for each six months' default. This tax, as originally imposed in 1902, discriminated against foreign corporations by assessing them at a greater percentage, and was declared void by *Am. Sm. Co. v. Lindsley, 204 U. S. 103*, whereupon the act was amended as above, taxing both sorts equally, so that it is now doubtless valid as to both classes.—*34 Colo. 240; 82 P. 531.*

Assessments on Stock.

By *R. S.* §§ *979-982* provisions are enacted for the assessment of shares of companies whose stock is made assessable under the charter or "by the laws of this State." The assessment is to be made by action of the Board of Directors by a majority vote, notice of meeting being first given to each Director. No greater assessment than 10 per cent. can be made at one time, and a second assessment must not be within thirty days after date of sales under the previous assessment.

The assessment is made payable "immediately" and if unpaid after thirty days, is considered delinquent, and may be advertised for thirty days in a daily paper published at the place of the chief office of the company, and also in a daily paper published where the mine is located (with provisions for cases where daily papers are not published).

If not paid within twenty days "from the date the same became delinquent," the secretary is empowered to sell the shares at public auction in front of the chief office of the company to the highest bidder for cash.

The Act read literally, makes the sale to come off within the period of publication; but it must mean, if it mean anything, that the sale is to take place not less than twenty days after the expiration of the thirty days' publication.

The Act further requires notice to be sent to each stockholder, informing him of the assessment.

FORM OF RESOLUTION TO ASSESS.

Resolved, That an assessment of five per cent. is hereby levied and made upon each and every share of the capital stock of this corporation, payable immediately at the office of the company to *George M. Scott*, the treasurer.

NOTICE OF ASSESSMENT.

Office of *The Experiment* Mining Company,
Equitable Building.
Denver, Colo., Jan. 1, 1908.

To *W. E. Bridgman*, Stockholder:

You are hereby notified that at a regular meeting of the Board of Directors of The Experiment Mining Company this day held at the office of said company, by a majority vote of all the directors, each and every share of the capital stock of said company was assessed *five* per cent. on the par value, such per cent. amounting to *$5.00* on your *100* shares of stock, payable immediately to *George M. Scott*, the Treasurer, at this office, address above given, and that such assessment, if not paid on or before the *3d* day of *February, 1908*, will be delinquent, and your stock will thereupon be advertised for sale, the sale to take place on the *28th* day of *March, 1908*, according to the terms of Section 982 of the Revised Statutes of Colorado.

C. S. WALLACE, Secretary.

It does not seem that this Act can refer to companies by whose articles the stock is made non-assessable. Nor does it apply to assessments for instalments of the original purchase price of the shares, sale of which on default is provided for by *R. S. § 850.*

Irregular Action.

A company which has habitually neglected all formalities cannot plead the want of them to escape liability.—*G. V. B. Co. v. Bank, 95 F. 23.* So held where it allowed one director to assume entire management.—*Robinson Co. v. Johnson, 50 P. 215.* A resolution of the Board is not necessary to bind the company where it has had value received with knowledge.—*McKenzie v. Poorman Mines, 88 F. 112.*

Fraudulent Organization.

A company may sue its organizers where the real price paid is less than that represented to the stockholders.—*Pittsburg Co. v. Spooner, 42 N. W. 259; 17 Am. St. R. 149.* Acts of directors distinguished from acts of the company.—*Summerlin v.*

Fronteriza Co. 41 F. 249. Bona fide holder of stock issued on over valuation not liable to creditors.—*Du Pont v. Tilden, 42 F. 87.*

Where mining property is located or purchased by an officer of the corporation his liability to the company depends upon whether or not he has been guilty of a breach of trust.—*Calumet Co. v. Phillips, 72 P. 1064; Lagarde v. Anniston Co. 20 M. R. 545; 28 So. 199.*

The Manager's knowledge of value—of ore shoots discovered in the mine—is the property of his company.—*Clark v. Buffalo Hump Co. 122 F. 243.*

A corporation may be held in equity to refund price of stock sold on fraudulent prospectus and fraud of its promoters.—*Cox v. National Oil Co. 56 S. E. 494.*

Inexperienced persons buying stock have a right to rely upon the statements of the promoters, and a purchaser has his action where they falsely asserted that the mine was free from debt.—*Tinker v. Kier, 94 S. W. 501.*

Reorganization.

Where a new company is formed with same stockholders or other like suspicious incidents it is but a successor and liable for the debts and covenants of the old one.—*Higgins v. California Co. 55 P. 155.*

Agent—Manager—Officers.

The President and Secretary alone have no right to appoint a general agent.—*Johnson v. Sage, 44 P. 641.*

Parties dealing with general agents of foreign corporation have the right to assume that he has full powers. *Rathbun v. Snow, 123 N. Y. 343; 25 N. E. 379.* Superintendent has right to buy current supplies.—*Stuart v. Adams, 89 Cal. 367; 26 P. 970.*

The Secretary of the Company has no power, by virtue of that office, to contract for the company, but the Secretary may be made the company's agent, and

his acts then bind it.—*Ross Oil Co. v. Eastham, 85 P. 531.* The same as to its president.—*Wood v. Saginaw Co. 105 N. W. 101.* Complaint held good where a stockholder charged the company with attempt to depress the value of the stock and of intention to not perform the annual labor and relocate the company's claims.—*Glover v. Manila M. Co. 104 N. W. 261.*

An agent acting in bad faith forfeits commissions. *Williams v. McKinley, 65 F. 4.* Company presumed to know the fraud of its agents. *Argentine Co. v. Benedict, 18 Utah, 183; 55 P. 559.*

May offset collection against wages. *Hood v. Hampton Co. 106 F. 408.* Principal cannot accept benefits and repudiate agency. *Genter v. Conglomerate Co. 23 Utah, 165; 64 P. 362. Barnard v. Roane Co. 17 M. R. 94; 2 S. W. 21.*

No authority to sell the future product of the mine; agent had contracted for more than the mine could produce. *Blackmer v. Summit Co. 187 Ill. 32; 58 N. E. 289.* Persons dealing with an agent when agent's authority is in writing are bound to take notice thereof. *Id.*

Mine manager has no power to bind the corporation for medical services to injured employees. *Spelman v. Gold Co. 26 Mont. 76; 66 P. 597.* But see *Mt. Wilson Co. v. Burbridge, 11 Colo. App. 487; 53 P. 826.*

A mine manager cannot in general borrow money or pledge the credit of his company. *Hawtayne v. Bourne, 1 M. R. 285; 7 M. & W. 595; Breed v. Bank, 1 M. R. 467; 4 Colo. 481; Cons. Gregory Co. v. Raber, 1 M. R. 405; 1 Colo. 511.* An agent of two companies has the right to exchange supplies. *Adams Co. v. Senter, 1 M. R. 241; 26 Mich. 73.* An agency for the care of property may be both created and proved by parol. *Hardenbergh v. Bacon, 1 M. R. 352; 33 Cal. 356.*

The appointment of an agent for a corporation to make a contract for work and labor need not be made under seal or by resolution of the board. *Crowley v. Genesee Co. 4 M. R. 71; 55 Cal. 273.* Agent can-

not act for both parties without their consent. *Finerty v. Fritz, 1 M. R. 437; 5 Colo. 174.*

General powers of superintendents, or general agents in charge of mine, will be recognized without proof, as covering all the ordinary local business of the concern; and persons dealing with them have a right to assume this, unless otherwise notified. *Adams Co. v. Senter, 1 M. R. 241; 26 Mich. 73.* General power of attorney implies no power to make promissory note.—*Washburn v. Alden, 1 M. R. 320; 5 Cal. 463.*

Where directors deal with and make profit out of their corporation the burden is on them to show that the transaction was fair and open.—*Baker v. Montana Co. 89 P. 66.*

Where a corporation allows its president and general manager to practically control its business it is liable on a note given by such officer.—*McKinley v. Mineral Hill Co. 89 P. 495.*

Miscellaneous Rulings.

Incorporators are liable for preliminary expenses.—*Hersey v. Tully, 44 P. 854; See Hecla Co. v. O'Neill, 19 N. Y. Sup. 592; Winters v. Hub Co. 57 F. 287.*

And the company may be held for the contracts of its promoters without formal adoption of the same by resolution of the Board.—*Possell v. Smith, 88 P. 1064.* Distinction between *de facto* and *de jure* director.—*Rozecrans Co. v. Morey, 43 P. 585.*

Corporate officers may recover on a quantum meruit for services in excess of their official duties. —*Gumaer v. Cripple Creek Co. 90 P. 81; Severson v. Bimetallic Co. 44 P. 79; Felton v. West Co. 40 P. 70; Ruby Co. v. Prentice, 52 P. 210.*

Amendment of Articles.

This subject in Colorado is regulated by the Act of 1907.—*R. S. §§ 878-886.* A meeting of stockholders must be called for on 30 days' notice, and two-thirds must assent to the amendment.

Dissolution.

Provision is made for the dissolution of solvent corporations desiring to go out of business by publication and filing of notices, without judicial action thereon.—*R. S.* § *895.*

For consideration of the rights of stockholders when the company has quit business and has no known Board of Directors, see *Tennessee Co. v. Ayers, 43 S. W. 744.*

FOREIGN CORPORATIONS.

A corporation has no recognized existence except by comity outside of the State of its organization. It is, however, always allowed to do business elsewhere by complying with certain statutory conditions for the protection of local creditors, such conditions usually including that it file a copy of its Articles with the Secretary of State and with the County Recorder of the place where it is intended to carry on its mining operations or other principal business, and that it designate a local agent upon whom process may be served.

Such conditions for Colorado are: That it file a copy of its charter in the office of the Secretary of State; or if "incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law duly certified and authorized by the proper authority of such foreign State, Kingdom or Territory."

That it file with the Secretary of State and in the office of the County Recorder a certificate designating its principal place of business and designating an agent residing at such principal place of business upon whom process may be served.—§§ *916, 917.*

A failure to comply with either of the above requirements imposes personal liability on its officers, agents and stockholders for the debts of the company.

It must also file an impression of its corporate seal.

It must receive from the Secretary of State a certificate that all the filing fees and taxes have been paid; commonly called a certificate of authority.—§ *910.*

DESIGNATION OF PROCESS AGENT.

STATE OF NEW YORK, County of *New York:* ss.

It is hereby certified, That the *Mohawk Mining Company,* a corporation organized under the laws of said state, doth hereby designate that the "principal place where the business of such corporation shall be carried on in the State of Colorado," is *Central City,* County of *Gilpin,* State of Colorado, and that *Henry C. Becker,* residing at said principal place of business, is the authorized agent of said company, upon whom process may be served.

Witness the corporate name and seal of said company, and the signatures of its President and Secretary, this *3d* day of *February,* A. D. *1907.*

[SEAL.] MOHAWK MINING COMPANY,
J. BRISBIN WALKER, President.
CLARENCE CARY, Secretary.

STATE OF NEW YORK, County of *New York:* ss.

I, *Herbert E. Dickson* (195 Broadway), Commissioner of Deeds of the State of Colorado, duly commissioned and sworn, in and for said County, do hereby certify that *J. Brisbin Walker,* President, and *Clarence Cary,* Secretary, of the within named Corporation, who are personally known to me to be such President and Secretary of said Corporation, personally appeared before me this day, and acknowledged the within Instrument (in duplicate) to be their free and voluntary act and deed, and the free and voluntary act and deed of said Corporation.

Witness my hand and official seal this *3d* day of *February,* A. D. *1907.*

[SEAL.] *Herbert E. Dickson,*
Commissioner of Colorado.

One copy of the above instrument must be filed with the Secretary of State, and one in the office of the Recorder of the proper county.

A similar form, not naming the agent, but designating him in general terms, was held sufficient in *Goodwin v. Colorado Co. 110 U. S. 1.*

Discriminations Against Foreign Corporations.

Besides the above special requirements it is declared that they "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed on" domestic corporations. Where they mortgage their property they must give public notice so that prior creditors may protect themselves.

They must file annual reports the same as domestic companies. And the re-organization or liquidation of foreign companies to the prejudice of local shareholders is attempted to be prohibited.—*R. S.* §§ *917, 911, 920.*

Domestic Charter Preferable.

The provisions of the above and like statutes in other states, together with the fact that a foreign corporation is liable to attachment for debt as a non-resident, and must file special security for costs where a plaintiff, renders a domestic organization preferable in most cases.

Domestic Organization by Non-Residents.

The Corporation Law of Colorado does not in terms require the organizing associates to be citizens or residents; and although a domestic organization composed entirely or substantially of non-residents would be practically in some respects a foreign corporation, yet its validity, at least when collaterally attacked, seems to be conceded.—*Humphreys v. Mooney, 4 M. R. 76; 5 Colo. 282.*

TENANTS IN COMMON.

Right to Work the Mine.

Two or more persons owning undivided interests in mining ground are tenants in common, but unless working it together by agreement are not partners.

At Common Law each could work without accounting to the other. This was changed by the Statute of *4 Anne Ch. 16, § 27.*

Most States have adopted the tenor of that Statute to wit: That the excluded co-tenant may have his proper action for his share of the proceeds of the working.

When any such statute has been enacted giving the right to an account and taking away the Com-

mon Law right of each to work at his own risk but to his own exclusive profit, the law seems to be:

That any Co-tenant may work the common property, at his own risk, if he works to a loss but must account to his Co-tenants if he works to a profit.

A co-tenant may lawfully bore for oil. If he finds it he must account to co-tenants, and if he does not, must stand the expense alone.—*Lone Acre Co. v. Swayne (Tex.), 78 S. W. 380.*

The owner of the majority interest may, by Statute in Idaho, work the mine, but may not exclude the minority from access to the property.—*Sweeney v. Hanley, 126 F. 97.*

Where the minority works the majority may direct the management.—*Hawkins v. Spokane Co. 28 P. 433; 33 P. 40.*

Measure of Damages on Accounting.

The Measure of Damages adopted has not been uniform. The rental value of the premises was allowed in the leading case of *Early v. Friend. 16 Grat. 21; 14 M. R. 271.*

The value of the coal in place was allowed in *McGowan v. Bailey, 179 Pa. 470.*

"What is just and equitably due" is the measure of accounting under Pennsylvania Statute.—*Fulmer's App. 128 Pa. 24.* See full note to the case as reported in *17 M. R. 246.*

Another line of cases allow full share of the profits which is not a just rule where a plaintiff has assumed none of the risks.—*Williamson v. Jones, 43 Va. 562; 19 M. R. 19; Job v. Potton, L. R. 29 Eq. 84; 14 M. R. 329.*

Where the entire property is leased by one Co-owner at a fixed royalty the measure of damages is plaintiff's proportion of the Royalty.—*Cicil v. Clark, 49 W. Va. 459.*

The co-tenant is entitled to his share of the profits but where defendant has worked to a loss plaintiff is not entitled to any recovery.—*Edsall v.*

Merrill, 37 N. J. Eq. 114; McCord v. Oakland Co. 64 Cal. 134; 49 Am. R. 686.

In Illinois a single co-tenant working the mine was treated as a trespasser in. *Murray v. Haverty, 70 Ill. 318; 14 M. R. 325.* And the law of Montana as to co-tenants was construed with almost equal severity in *Anaconda Co. v. Butte Co. 43 P. 924; Red Mountain Co. v. Essler, 44 P. 523.*

Under the West Virginia Statute it is waste if a co-tenant sinks for oil.—*Dangerfield v. Caldwell, 151 F. 554; McNeely v. S. Penn. Oil Co. 52 S. E. 480.* These West Virginia and Montana cases construe special Statutes, and the Illinois decision is against the entire burden of the authorities.

Relations to the Common Title.

A relocation by one operates for the benefit of all, even if made unknown to the others, and with a change of name of the claim.—*Van Wagenen v. Carpenter, 27 Colo. 445.* *See p. 125.*

A tax title acquired by one of the co-tenants enures to the benefit of all.—*Moragne v. Doe, 39 So. 161.*

Possession by a co-tenant is not adverse without notice to the co-tenant out of possession that his title is denied.—*Rich v. Victoria Co. 147 F. 380.* And where the mineral and surface estates have been severed the possession of the surface owner is not possession of the minerals.—*Manning v. Kansas Co. 81 S. W. 140.*

They may deal with each other as with strangers as to their respective interests in the common property.—*Bissell v. Foss, 114 U. S. 252.* But they can not collude with one another or with strangers to deprive a co-tenant of his full share of purchase money. See citations, p. 282.

A co-tenant may not use the common property through which to work other property in which his co-owner has no interest.—*Peo. v. District Court, 20 M. R. 734; 62 P. 206; Butte Co. v. Montana Co. 60 P. 1039; Laesch v. Morton, 87 P. 1081.*

INDIAN RESERVATION.

An Indian reservation is not a part of the public domain open to exploration, or occupation, and a valid mining location cannot be made upon it.—*French v. Lancaster, 47 N. W. 395; Gibson v. Anderson, 131 F. 39.* Nor can both parties waive the point.—*47 N. W. 395.* An attempted location made before the extinguishment of the Indian title must yield to one made after its purchase.—*Kendall v. San Juan M. Co. 9 Colo. 349.*

But in *Noonan v. Caledonia M. Co. 121 U. S. 393,* the Supreme Court of the United States have ruled that on the cession of the reservation the claim becomes valid. This case was followed by the affirmance of the *Kendall case* above cited (*144 U. S. 658*) where the court adjudged that the original location, although not valid, might have been made good by record in the nature of a relocation within the same period of time after the opening of the reserve, as is allowed to record from the date of discovery. This not having been done an intervening locator who entered after the opening of the reservation was held to have the elder and better title.

A claim within the reservation cannot be patented.—*Copp, M. L. 253.* And the location of scrip thereon is void.—*U. S. v. Carpenter, 111 U. S. 347.*

The court will protect a right to mine by license from the Indian Nation.—*Oolagah Co. v. McCaleb, 68 F. 86.*

When a reservation is opened it is not necessary for mineral prospectors to await the issue of the proclamation.—*McFadden v. Mt. View Co. 87 F. 154.*

FOREST RESERVES.

By Act of Congress March 3, 1901, 26 Stat. 1095, the President is authorized to create, by proclamation, forest reserves in any part of the public lands.

Certain particular Reservations have by special act been opened to the location of mining claims, but by Act of June 4, 1897, 30 St. L. 36, mineral lands in all forest reservations are especially excepted from the reserve and are open to location and entry under the mineral laws.—*32 L. D. 307.* And all mining Rights of Way are allowed across them.—*33 St. L. 628.*

The discovery and location of a claim on the Reserve is made exactly as if it were on non-reserved land, but the Forest Ranger is authorized to examine and report as to its being a *bona fide* claim. His duties in the premises and the restrictions as to ditches and timber cutting are set out in a publication by the department (1907) called the USE BOOK.

The regulations of the Department permit owners of mining claims to cut timber for actual mining purposes in connection with the particular claim for which the timber is cut.—*Par. 20, 30 L. D. 28.*

ORE CONTRACTS.

An ore purchase contract between mine and smelter for the sale of ore is not assignable, as the mine contracts for the skill and integrity of that particular smelter.—*Arkansas Val. Sm. Co. v. Belden Co. 127 U. S. 379; Winchester v. Davis Co. 67 F. 45; Wheeler v. Walton Co. 64 F. 664.*

Failure to receive pay justifies failure to make future deliveries.—*Cherry Val. Co. v. Florence Co. 64 F. 569.*

Delivery of ore to a reduction company, to be paid for after assay, is a sale and not a bailment of each lot of ore.—*Chisholm v. Eagle Ore Co. 144 F. 670.*

A promise to pay a debt out of the proceeds of ore is not an equitable assignment of such proceeds. —*Silent Friend Co. v. Abbott, 42 P. 318.*

Action for conspiracy between officers of the mine and mill owners to obtain bonus for treating the ore—presumptions and evidence in such case.—*Fox v. Hale Co. 41 P. 308.*

A, in Michigan, agreed to sell to plaintiff, graphite ore to be delivered on cars in Mexico; held that cause of action for non-delivery accrued in Mexico.—*U. S. Co. v. Pacific Co. 68 F. 442.*

Construction of ore contracts calling for certain percentages of mineral and for special assay values with deductions for moisture.—*Trotter v. Heckscher, 4 Atl. 83; 7 Atl. 353; Lehigh Co. v. Trotter, 10 Atl. 608; Anvil Co. v. Humble, 153 U. S. 540; Martinez v. Earnshaw, 22 Atl. 668.* Measure of damages for failure to deliver ore.—*Patrick v. Colo. Sm. Co. 38 P. 236.*

Amount of moisture is determinable by tests of like ore from same mine.—*Vietti v. Nesbitt, 41 P. 151.*

The smelter is not liable for mineral left in the tailings, there being no proof of negligence.—*Guild Co. v. Mason, 46 P. 901.*

Where an average of a certain assay is to be accounted for, one month may make up for another.—*Fox v. Mackay, 57 P. 672.*

Construction of contract for delivery of ore "free from foreign substance."—*Worthington v. Given, 24 So. 739.* Of ore breaking contract terminable when prejudicial to the development of the mine.—*Anvil Co. v. Humble, 153 U. S. 540.*

A contract or promise to pay out of the proceeds of a mine becomes an absolute promise after the lapse of a reasonable time.—*McIntyre v. Ajax Co. 77P. 615; White v. Century Co. 78 P. 868; Busby v. Century Co. (Utah), 75 P. 725.*

When the buyer refuses to receive the seller has the right to store the ore and sue for the price; or to sell the ore and recover the difference in price.—*Habeler v. Rogers, 131 F. 43.*

Contract construed to bind the seller to furnish the ore of its own mines.—*Shackelford v. Sloss Co. 36 So. 1005.*

A contract for the ore of a certain mine entitles the buyer to the run of the mine although the ore tendered from another mine was not below the agreed assay.—*Globe Co. v. Tennessee Co. 85 S. W. 1177.* A contract to furnish coal from a particular mine is not fulfilled by tender of coal from other mines though equally good.—*Hesser v. Chicago Co. 151 F. 211.*

ORE BUYERS.

Ore Book to Be Kept.

Every company or individual "engaged in the business of milling, sampling, concentrating, reducing, shipping or purchasing ores in the State of Colorado," is required to keep a book in which shall be entered at the time of the delivery of each lot of ore—

First.—The name of the party on whose behalf such ore is delivered, as stated.

Second.—The name of the teamster, packer, or other persons actually delivering such ore, and the name of the owner of the team or pack train delivering such ore.

Third.—The weight or amount of every such lot of ore.

Fourth.—The name and location of the mine or claim from which it shall be stated that the same has been mined or procured.

Fifth.—The date of delivery of any and all lots or parcels of ore.—*R. S. § 4235.*

The succeeding sections provide that parties claiming an interest in ore delivered shall have the privilege of examining such books and for penalties in case of failure to keep the same. And that neglect to make proper inquiries from parties bringing ore to the mill shall not excuse failure to comply. They also attempt to make the purchaser criminally liable for ore bought from mines held "contrary to any penal law now in force," which was intended to include cases where possession had been taken by violence, contrary to the provisions of the Jumping Act. —*R. S. §§ 4220, 4239.*

Bullion and Specimen Buyers.

A similar Act refers to buyers of gold dust, amalgam, bullion and gold specimens, the intent being to produce means to trace such property when stolen. *R. S.* §§ *4252-4255.*

Ore Bought of Wrongful Mine Claimant.

In 1889 the question of the responsibility of the ore buyer for ore taken by trespass having often arisen and a case of some importance involving the question then pending in the Supreme Court, an Act was passed providing for the case of ore taken from mines, the title to which was in dispute.

It provides that a party in peaceable possession under claim and color of title is to be deemed the owner, and the buyer of ore, in good faith is to take title to the ore, but that the party out of possession may protect himself by notice to the ore buyer, the following form containing the substance required:

Denver, Colo., *January 9, 1908.*

To *The Taylor & Brunton Sampling Works Company:*

Take notice that I am the claimant and owner and entitled to the possession of the *Nightmare* Lode Mining Claim, situate in Creede Mining District, County of Mineral, State of Colorado: That *Richard A. Parker* and *Thomas B. Crawford* and persons under them are mining and shipping gold ore which is my property, from said claim under the name of the *Pleasant Dream* Lode, or under some other name. And you are hereby notified under the terms of the Statute in such case made and provided that you will be held responsible for all ores purchased and delivered from said mine by said *Richard A. Parker* and *Thomas B. Crawford*, or either of them, or by any person for them, subsequent to the service of this notice.

FRANK H. WOLCOTT.

The person serving this notice must within five days thereafter follow it up with suit for injunction, and provision is made to limit the liability in case the injunction is not heard within thirty days, and to avoid its effect if the writ is denied or afterwards discharged, although the plaintiff may ultimately prove title. If such notice is served and followed by obtaining the writ and the party warned persists in

buying the ores in dispute, he is to be held responsible to the person ultimately adjudged the owner.

If suit has been already brought when the notice is served, add to the above form: (§ *4238.*)

"Suit is pending in the District Court of *Mineral* County to enjoin the further shipping or sale of ores by said parties from said claim."

A proviso is contained in the Act that it shall not protect against liability for the purchase of ores taken by persons holding claims under the Mine-Jumping Act, or ore stolen by lessees.

Ore Mined Under Claim of Right.

The suit above referred to, *Omaha Co. v. Tabor, 16 M. R. 184; 13 Colo. 41,* was decided later, holding the ore buyers liable as trespassers—the decision making no reference to the point really involved or the line of authorities relative to the point—that, where personal property is produced from real, by the labor of a party in possession with claim and color of title, it becomes marketable without regard to the ultimate decision on the question of who was the owner of the realty.—*Brown v. Caldwell, 12 M. R. 674; 10 S. & R. 114; Smith v. Idaho Q. M. Co. 11 P. 878; Mather v. Trinity Church, 14 M. R. 472; 3 S. & R. 509; Lehigh Co. v. N. J. Co. 26 Atl. 920; Harlan v. Harlan, 15 Pa. St. 507; Anderson v. Hapler, 34 Ill. 436; Page v. Fowler, 28 Cal. 605; National Co. v. Weston, 15 Atl. 569; Giffin v. Pipe Lines, 33 Atl. 578.*

PENAL PROVISIONS.

False Weights and Assays.

There are in all the mining States penal Statutes more or less alike in wording and intent prescribing punishment for such self-evident offenses as the using of fraudulent gold dust scales (*§1851*) or false ore-buyers' weights and scales or the certify-

ing to false assays or making false return of ore weight or value.—*R. S. Colo.* § *4240.*

Debased Gold Dust.

Sections *1708, 9* make it penal to knowingly have or pass debased gold dust. In *Peo. v. Page, 1 Ida. 102.* the defendant was convicted on indictment for having in possession instruments for manufacturing bogus gold dust. In *Peo. v. Sloper, 1 Ida. 158* and *Peo. v. Page, Id. 189,* the offense of uttering such material is discussed.

Salting Ore.

That every person who shall mingle or cause to be mingled with any sample of gold or silver-bearing ore, any valuable metal or substance whatever that will increase or in any way change the value of said ore, with the intent to deceive, cheat or defraud any person or persons, shall on conviction thereof, be punished by a fine of not less than five hundred nor more than one thousand dollars, or by confinement in the penitentiary for a term not less than one nor more that fourteen years, or by both such fine and imprisonment.—*R. S. Colo.* § *1863.*

Ore Stealing From the Mine.

If any person shall break, sever or separate with intent to steal, ore or mineral from any mine, lode, ledge or deposit in this State, or shall take, remove or conceal ore or mineral from any mine, lode, ledge, deposit or dump, with intent to defraud the owner or owners, lessee or licensee, or any tenant in possession of any mine, lode, ledge, deposit or dump, or any person in possession and claiming under color of title any mine, lode, ledge, or dump, such person shall be deemed guilty of grand larceny, and upon conviction shall be punished as for grand larceny. —*R. S. Colo.* § *1680.*

The above section amends the act of 1903 which was limited to ore of the value of $20.

Trespass Not Larceny.

Except as modified by such statutes as said section 1680, the taking of ore by severing it from the realty accompanied by its immediate asportation, can in no case be considered larceny.—*Peo. v. Williams, 4 M. R. 185; State v. Berryman, Id. 199; State v. Burt, Id. 190.*

This distinction is in some of the cases referred to as unsubstantial and technical, although its force as decided law is not questioned. On the contrary, it is a distinction necessary to check the constant tendency to seek a criminal remedy where the civil remedy is ample. Excepting the instance of what is known as "high grading" the severance is wholly without felonious intent.

The malicious removal of location marks is made a misdemeanor by the terms of *section 1899.*

Under a statute on this subject it was held that there must be proof of a lawful stake on a valid mining claim—and that where the only proof of discovery was that the stake was posted after finding "quartz and vein matter," there was no proof of a valid location stake, such as the law was intended to protect.—*Territory v. McKey, 19 P. 395.*

Malicious Mischief.

By *R. S. Colo. 1900,* it is made a misdemeanor to unlawfully destroy any shaft-guard or remove the timbers from any shaft, incline or tunnel.

Cutting Timber or Removing Buildings.

Besides the section as to malicious mischief there are two sections harsh and cruel, in defining mere trespass into crime, by leaving out entirely the element of malice or other criminal intent, making the cutting of timber or removing of buildings a misdemeanor. §§ *4222, 4223.* The strictest construction against it has been heretofore given to a statute of like character.—*Bradley v. Peo. 8 Colo., 599.*

Jumping Claims by Stealth or Violence.

R. S. Colo. 4220, passed in 1874, prohibits acts of this character. The Act consists of a single paragraph of interminable length. It makes the association of two or more persons for the purpose of taking possession of a claim in possession of another, by stealth or violence, a misdemeanor. The section is intended to prevent what has commonly been termed "jumping," which word is met with in some of the

old statutes as well as in the district rules, and occasionally in law reports.—*Arnold v. Baker, 7 M. R. 111; 6 Neb. 134; Murphy v. Cobb, 5 M. R. 330; 5 Colo. 281.* As a penal statute it is awkwardly framed, and the substantial remedy is by a section passed at the same time, by which *possession is restored* to the party forcibly dispossessed—*See p. 369.*

Coal Mines.

There are also Acts. *R. S. Colo. 638-660*, regulating coal mines, specially providing for inspection of same and guarding against spontaneous combustion, gob-fires, open pits, fire damp and other dangers.

The Federal Acts of 1891 and 1902 (*26 St. L. 1104; 32 St. L. 631*) provide for the inspection and regulation of coal mines in the Territories and prohibit employment of children in the same.

Oil Wells are required to keep their products from

emptying into any natural water course.—*R. S. Colo. 1818.*

Ventilation—Children.

The Constitution, Art. 16, § 2, requires the passage of laws securing safety escapes and ventilation in mines.

The acts on these subjects are cited under INSPECTOR, *p. 376.*

The employment of children under fourteen years of age is forbidden by *R. S. § 547.*

The eight hour law applies to underground miners, to smelters and other ore-treating processes.

EJECTMENT.

Pleadings.

Under Code practice the names of the various actions are abolished, but the distinctions being in-

herent, the term Ejectment has its specific application the same as formerly.

Section 286 Colo. Code requires a concise statement in the complaint of the nature of the title when possessory.

Supporting Adverse Claims.

It is the proper action to bring, and the one in fact generally brought in support of an adverse claim. —*Becker v. Pugh, 15 M. R. 304; 9 Colo. 589; Burke v. McDonald, 13 P. 351.* In such suit it is immaterial which party is in actual possession at the time when the action was brought.—*Id.* And no proof of an ouster is required.—*Golden Fleece Co. v. Cable Co. 1 M. R. 120; 12 Nev. 312.* Or each party may be in possession of a part of the contested premises.—*Rose v. Richmond Co. 27 P. 1105.* Notifying defendant not to work is an ouster.—*Bramlett v. Flick, 57 P. 869.*

The object of the suit is to determine the right of possession, and the result is to decide which party is entitled to a patent from the United States. The Government being thus an interested party, each side must prove its own case affirmatively, and to either recover or successfully defend must show a valid location.—*Bay State Co. v. Brown, 21 F. 167; Jackson v. Roby, 109 U. S. 440; McGinnis v. Egbert, 8 Colo. 41; 15 M. R. 329; Rosenthal v. Ives, 15 M. R. 324; 12 P. 904.* Neither party is entitled to a verdict upon mere proof of prior possession alone—as is the rule in a contest where individuals only are interested.—*Sears v. Taylor, 5 M. R. 318; 4 Colo. 38.* But possession alone is good against an intruder, especially one who enters by violence.—*Haws v. Victoria Co. 160 U. S. 303.* Possession may become incidentally a material issue in the case.—*See* ADVERSE CLAIM.

Averment of Suit Brought in Time.

In a complaint carefully and technically drawn there will be an averment that the adverse claim was

filed within the period of publication and the suit brought within the 30 days, but both the right of the thing and the weight of authority is that they are not essential averments. If, in fact, the adverse claim was not filed or the suit not brought within these respective limited periods it is a matter of defense to be raised by the answer.—*Providence Co. v. Marks, 60 P. 938; Marshall Co. v. Kirtley, 12 Colo. 417; Altoona Co. v. Integral Co., 45 P. 1047; Pennsylvania Co. v. Bales, 70 P. 444; Hain v. Mattes, 83 P. 127.*

No Second Suit.

If suit be dismissed a second suit cannot be brought after the expiration of the thirty days.—*Steves v. Carson, 16 M. R. 12; 42 F. 821;* and if not filed in time the suit cannot be supported as an ordinary ejectment.—*Hunt v. Eureka Gulch Co. 14 Colo. 451.*

Second Trial.

The right, as of course, to a second trial in ejectment in Colorado is abolished since 1899.

Possession Without Location—Location Without Discovery.

The Congressional Act, § 2320, says that "no location of a mining claim shall be made until the discovery of the vein." And in sequence to this it has been ruled that if there is no valid location there can be no rightful possession.—*Belk v. Meagher, 1 M. R. 510; 104 U. S. 279; Sweet v. Webber, 7 Colo. 450.* A prospector, at least after he has discovered mineral, has the right to be undisturbed in whatever shaft or other work he is prosecuting.—*Faxon v. Barnard, 2 McCr. 44; 9 M. R. 515.* But only by compliance with the Statute (by a valid location) can he prevent other prospectors from entering upon any ground except that in his actual occupation.—*Becker v. Pugh, 15 M. R. 304; 9 Colo. 589.* The posting of notice without discovery or indications of mineral

cannot warn off other prospectors.—*Erhardt v. Boaro, 113 U. S. 537; 15 M. R. 447.* He may protect himself in his *pedis possessio* (the ground in actual as distinguished from constructive possession), while in the search for, before he has discovered, mineral. And as against another miner, where neither has discovered a vein, he has the better right.—*Field v. Grey, 25 P. 793.*

The question which these citations lead up to is this: Can a prospector, before discovering mineral, stake off a full claim and keep off all other prospectors while he is engaged in hunting for mineral? In other words, can he set up his stakes first and make his discovery afterward on the supposition that when he does strike the vein his stakes already set will be found to cover the legal width on each side? Can he, in spite of the law which says he can not, make a valid location before discovery; or, which is the same thing, have all the practical benefits of a location, before such discovery? The cases go to the length of protecting his actual workings—and this would prevent encroachment so close as to hinder work or threaten a breach of the peace. The *Boaro case* seems to intimate that he may protect himself when at work on float, or after substantial assurance of the proximity of the lode. In the *Field case* the point is approached and almost decided, that he may hold by location without discovery. The burden of the other cases and the text of the law is against the proposition—that staking a claim before discovery excludes other prospectors. All have the same right to seek till one has found; no one has a right to fence out others from the right of seeking what he himself is only seeking. *See pp. 27, 33.*

The party who is the first to comply with the law though he may not be the first discoverer holds the first title.—*Sisson v. Sommers, 19 M. R. 644; 55 P. 829; Lockhart v. Johnson, 181 U. S. 527; Copper Globe Co. v. Allman, 21 M. R. 296; 64 P. 1019; Gregory v. Pershbaker, 15 M. R. 602; 73 Cal. 109.*

Prior possession is better title than an invalid location.—*Connolly v. Hughes, 71 P. 681.*

Possession—How Proved.

A person who has purchased a mining claim which had been properly located and marked out upon the ground, and who is personally or by his agents upon the claim, working and devoloping it, and keeping up the boundary stakes and marks thereof, is not merely in the constructive possession of such claim by virtue of mining laws, but is in the actual possession of the whole claim: such possession is a *possessio pedis*, extending to the boundary lines of the claim.—*North Noonday Co. v. Orient Co. 1 F. 522; 9 M. R. 531.* Digging a shaft, building a cabin, etc., held proof of possession.—*Koons v. Bryson, 69 F. 297.*

Actual occupation of a part of the claim under papers calling for the entire tract by metes and bounds, or by the name of the claim, gives constructive possession of the entire tract.—*Harris v. Equator Co. 12 M. R. 178; 8 F. 863; Attwood v. Fricot, 17 Cal. 38; 2 M. R. 305; Hess v. Winder, 12 M. R. 217; 30 Cal. 349.*

Possession is a question of law.—*Jordan v. Duke, 36 P. 896.* A witness must testify to facts, and it is for the Court to say whether these facts amount to possession.—*Thistle v. Frostburg Co. 10 Md. 129.* But the uniform holding of the United States Court, at Denver, has been that the question as to possession may be asked directly, leaving it to the cross-examination to bring out whether the facts stated amount to possession, and this is the more sensible practice.

The possession of the surface enclosing the apex is the possession of the vein wherever the dip may carry it.—*Montana Co. v. St. Louis Co. 102 F. 431.* A prospector drilling for oil is in possession and ejectment is the remedy to test his right of possession.—*Cosmos Co. v. Gray Eagle Co. 112 F. 4.*

Where a Statute speaks of parties in possession, it means that constructive possession which the law attaches to the title.—*Heinze v. Butte Co. 126 F. 1.* A mine claimant is in possession to his boundaries, although he may not know where his boundaries are. —*Molina v. Luce (Ariz.), 76 P. 602.* A party may be in legal possession, though not personally on the land at the time of a stranger's entry.—*Davis v. Dennis (Wash.), 85 P. 1079.*

Surreptitious running of a drift under the lines of the claim of another does not constitute possession of such claim.—*Badger Co. v. Stockton Co. 139 F. 838.*

Sinking an old shaft a few feet deeper and no other work done during a period of seven years does not amount to possession.—*Costello v. Muheim (Ariz.), 84 P. 906.*

Living in a tent on the claim and working on the same constitutes actual possession of mining ground. —*Lange v. Robinson, 148 F. 799.*

An Equitable Defense may be set up in ejectment.—*South End Co. v. Tinney, 35 P. 89.* Such defense must be specially pleaded.—*Brady v. Husby, 33 P. 801.*

Title in Third Party.

The rule that plaintiff must recover on the strength of his own title does not prevail in an action between possessory claimants.—*Strepey v. Stark, 7 Colo. 622; 17 M. R. 28; Murray Co. v. Havenor, 66 P. 762.* Otherwise, as to parties claiming under patent, or in ordinary contests as to legal title.— *Dyke v. Whyte, 17 Colo. 296.* A patentee has no right to disturb any person in possession of ground under, but excluded from, his patent.—*Reynolds v. Iron Silver Co. 15 M. R. 591; 116 U. S. 687.*

The Location Certificate as Evidence—Presumption of Location.

Where a plaintiff has been in actual possession of his claim for the full period of the Statute of

Limitations a presumption may be indulged as against a wrongdoer at least, that his location was regularly made, without putting him to proof of its successive steps.—*Harris v. Equator Co. supra:* Cited and approved in *Vogel v. Warsing, 146 F. 949.* When the location has been made for a considerable time and is held by *bona fide* purchasers the location certificate is *prima facie* evidence of discovery and location.—*Cheesman v. Hart, 16 M. R. 263; 42 F. 98; Yreka Co. v. Knight, 65 P. 1092.* In *Cheesman v. Shreeve, 40 F. 791; 17 M. R. 260,* it was held presumptive evidence of discovery. It is evidence of the performance of all things which the Statute requires it to recite.—*Strepey v. Stark, 7 Colo. 619.*

Exact evidence of all details is not to be expected in proof of discovery and location made many years before the time of trial.—*Becker v. Pugh, 17 Colo. 245; Yreka Co. v. Knight, 21 M. R. 478; 65 P. 1091.*

But in the absence of a Statute to such effect and barring the above exceptional instances it does not prove discovery or the several acts of location.—*Niles v. Kennan, 62 P. 360; Mutchmor v. McCarty, 87 P. 85.*

By Statute in Nevada and Montana the location certificate is *prima facie* evidence of location.

The defendant may show that plaintiff's discovery was upon land not subject to location and the claim therefore invalid.—*Girard v. Carson, 44 P. 508.* *See citations, p. 37.*

Ejectment Lies to Recover Ditch and water rights. —*Integral Co. v. Altoona Co. 75 F. 379.*

Non-Joinder of Co-Tenant.

It is no defense that all of plaintiff's co-owners are not made parties to the suit.—*Weese v. Barker, 7 Colo. 178; Erhardt v. Boaro, 15 M. R. 473; 113 U. S. 527.*

Allowance for Improvement.

A defendant holding by *bona fide* claim of title is by Statute in instances to be allowed for improvements. But mining is not necessarily an improvement.—*Bacon v. Thornton, 51 P. 153.*

FORCIBLE ENTRY.

The acts concerning forcible entry and unlawful detainer apply to possessory as well as other claims; but those acts are so involved, and so abrupt and cruel in their attempt to substitute haste for deliberation, that they result in driving to appeals and in the end to more lengthy and costly litigation than where ejectment is resorted to in the first instance.

Like Acts in other States—the repeated attempts by summary process to deprive a defendant of his day in court under pretense of doing speedy justice—are open to the same comment. Except as against a tenant holding over in defiance of his lease or refusing the payment of royalty or rent, this action will always be found a dangerous substitute for the ordinary action of ejectment. Especially is this the case where actions are commenced before Justices of the Peace, before whom proceedings are so vexatious, oppressive, and attended with so much heavier costs than such as accrue in Courts of Record, that it is rarely advisable to seek the remedy for any wrong, in any form of action, before them.

MEASURE OF DAMAGES.

Trespass for Ore Taken.

The true measure of damages depends upon circumstances of aggravation, ranging from the profits

of working to the gross value of the ore after breaking from the stope.—*Empire Co. v. Bonanza Co. 67 Cal. 406; In re United Merthyr Co. 10 M. R. 153; L. R. 15 Eq. 46; Ege v. Kille, 84 Pa. 333; 10 M. R. 212.*

The cost of mining should be deducted from the value of the ore in all cases where neither fraud nor culpable negligence constitute any element of the case.—*Waters v. Stevenson, 10 M. R. 240; 29 Am. Rep. 293; Durant Co. v. Percy Co. 93 F. 166; Hall v. Abraham, 75 P. 882; Lewis v. Virginia Co. 48 S. E. 280.* When coal was taken under bona fide claim of right a reasonable royalty should be the measure of damages.—*Sandy R. Co. v. White House Co. 101 S. W. 319.*

Under ordinary circumstances the just rule of compensation is the value of the rock, coal, ore or oil before the mining or quarrying began—the value in place.—*Dougherty v. Chesnutt, 5 S. W. 444; Coal Creek Co. v. Moses, 15 M. R. 544; 15 Lea (Tenn.), 300; Ege v. Kille, supra; Dyke v. Nat. Tr. Co. 49 N. Y. S. 180.* And where the ore has been taken by defendant's lessee, the royalty may be taken as the net profit.—*Colo. Cent. Co. v. Turck, 70 F. 294; New Dunderberg Co. v. Old, 97 F. 150; Moragne v. Doe, 39 So. 161.*

In wilful trespass, or where the defendant has mingled the ore or taken any steps to prevent ultimate proof of its value, these acts are to be taken against the defendant.—*Cheesman v. Shreeve, 40 F. 788;* even so far as to throw the burden of proving the value upon the defendant.—*Little Pgh. Co. v. Little Chief Co. 15 M. R. 655; 11 Colo. 223; St. Clair v. Cash Co. 47 P. 466;* and in cases of fraud a cotenant may even be denied plaintiff's share of legitimate expenses.—*Foster v. Weaver, 15 M. R. 551; 118 Pa. 42.* A wrongdoer is not entitled to cost of mining.—*Benson Co. v. Alta Co. 145 U. S. 428; Sunnyside Co. v. Reitz, 39 N. E. 541.*

A lessee holding over under claim of right is not a wilful trespasser and is to be allowed the cost of mining.—*Montrozona Co. v. Thatcher, 75 P. 595.*

Negligence to ascertain boundaries does not make necessarily a wilful trespasser but a deliberate intention to remain ignorant of boundaries does so.—*Resurrection Co. v. Fortune Co. 129 F. 668.*

Plaintiff may prove assays of ore left standing and computations of what was taken from the stopes —but an averaging estimate of how much each miner might have broken is too remote.—*Golden R. Co. v. Buxton Co. 97 F. 413.*

In *Omaha Co. v. Tabor, 16 M. R. 184; 13 Colo. 41,* the Court adopted the value of the ore when it became a chattel by severance from the realty. That is the rule where there was no *bona fide* claim of right, and under the circumstances of that case was an extreme ruling and against the almost unbroken weight of authority.

Confusion.

Mixture of ore got by trespass with ore rightfully mined does not necessarily bring the case within the rule as to confusion of goods.—*Maloney v. King, 76 P. 4.*

Natural Gas Company held to extreme measure of damages where it had fraudulently mingled lessors' gas without keeping any account of it.—*Stone v. Marshall Co. 57 Atl. 183; Great S. Co. v. Logan Co. 155 F. 114.*

Where the Mine is Under Lease and ore is taken by trespass, the lessee can recover in trover or trespass.—*Hartford Co. v. Cambria Co. 53 N. W. 4; Attersoll v. Stevens, 10 M. R. 67; 1 Taunt. 183.* And the lessor may recover to the extent of his royalty.—*Stockbridge Co. v. Cone Works, 6 M. R. 317; 102 Mass. 80.* Where the lessor treats disputed ground as his own he is liable to the owner for coal taken by his lessee.—*Dundas v. Muhlenberg, 14 M. R. 437; 35 Pa. 351.* The same as to an oil lease to the full value of the leasehold interest.—*Duffield v. Rosenzweig, 23 Atl. 4.*

No Deduction for Developments.

By Section 291 of the Code, in suits for mesne profits after recovery in ejectment (which does not necessarily include every trespass suit) "offsets" are not to be allowed for "timbering, cribbing, improvements or developments."

Special Injury to the Mine cannot, in trespass, be proved as damages, unless specially declared for.—*Patchen v. Keeley, 14 P. 347.*

Mesne Profits.

At common law a plaintiff out of possession could not recover for the ore taken until he had recovered possession by ejectment.—*Hugunin v. McCunniff, 14 M. R. 463; 2 Colo. 367.*

This is changed by statute in Colorado. R. S. Sec. 4219. The Plaintiff may recover the land and damages in a single action or by separate suits.—*Code, § 291.* The case of *Ghost v. Shuman, 4 Colo. Ap. 88,* which holds that they must be recovered in the original action, entirely overlooks this section.

In Miscellaneous Cases.

For the measure of damages on refusal to accept deed, see *Gilpin M. Co. v. Drake, 8 Colo. 586.* On breach of contract to lease.—*Chambers v. Brown, 28 N. W. 561.* In cases of negligence.—*Moody v. McDonald, 4 Cal. 297; 2 M. R. 187.* On tunnel contract.—*Monroe v. Northern P. Co. 5 Or. 509; 2 M. R. 652.* Against lessor for mining the ground leased.—*Chamberlain v. Collinson, 9 M. R. 37; 45 Ia. 429.* Against lessee for breach of covenants to mine.—*Cleopatra Co. v. Dickinson, 68 P. 456; Colo. Fuel Co. v. Pryor, 20 Colo. 540; Macon v. Trowbridge, 87 P. 1147.*

Measure of damages on fraudulent sale of mine or stock is the difference between the value received and the value parted with.—*Smith v. Bolles, 132 U. S. 125; 16 M. R. 159; Warner v. Benjamin, 62 N. W. 179; Stratton's Ind. v. Dines, 135 F. 449.*

Conversion of stock of no fixed market value.—*Moynahan v. Prentiss, 51 P. 94.*

On sale of coal.—*Osgood v. Bauder, 39 N. W. 887.* For stoppage of work on contract to sink, before shaft complete.—*Mooney v. York Co. 46 N. W. 376.*

Heavy verdict sustained for breach of contract to drive drainage tunnel.—*Occidental M. Co. v. Comstock T. Co. 125 F. 244.*

NEGLIGENCE. ACCIDENTS.

The same rule governs the liabilities of owners, lessees and contractors in case of accident to employes, as controls in other cases where the relation of master and servant exists and *negligence* is the foundation of the action.—"*Personal Injuries in Mines*" by E. J. WHITE (*1905*), *passim; Quincy Co. v. Hood, 12 M. R. 148; 77 Ill. 68; Strahlendorf v. Rosenthal, 10 M. R. 676; 30 Wis. 674.*

The Degree of Care required of the master is fully stated in *Southwest Co. v. Smith, 85 Va. 306; 17 Am. St. R. 59.* The miner has no recovery for the ordinary and unavoidable risks of the business.—*Cherokee Co. v. Britton, 45 P. 101.*

Instances of Responsibility.

He is liable for failure to timber dangerous ground.—*Trihay v. Brooklyn Co. 15 M. R. 535; 4 Utah 468; Sampson Co. v. Schaad, 15 Colo. 197.* Or for failure to observe his own code signals.—*Silver Cord Co. v. McDonald, 14 Colo. 191; 16 M. R. 171.* Or defective rope or hoisting gear.—*New York Co. v. Rogers, 11 Colo. 6; Myers v. Hudson Co. 150 Mass. 125; Donnelly v. Booth Co. 37 Atl. 874.* Or for scales, the fall of which should have been foreseen.—*Buckley v. Port Henry Co. 2 N. Y. S. 133; U. P. Ry. v. Jarvi, 53 F. 65; Wilson v. Alpine Co. 81 S. W. 278; Minton v. La Follette Co. 101 S. W.*

178. For a preventable cave.—*James v. Emmett Co. 21 N. W. 361; Pantzar v. Tilly Co. 99 N. Y. 368.* For rotten ladder.—*Reese v. Morgan Co. 54 P. 759.* For sending men into a blind upraise known to be filled with bad air.—*Portland Co. v. Flaherty, 111 F. 312.*

The mine owner must look to the proper support of his gangways and to the timbering and to the machinery above.—*Quincy Co. v. Hood, supra; Strahlendorf v. Rosenthal, supra; Ardesco Co. v. Gilson, 63 Pa. 146; 10 M. R. 669; Soyer v. Great Falls Co. 37 P. 838.* Failure to examine gangways.—*Ashland Co. v. Wallace, 42 S. W. 744.*

The miner has a right to assume that the roof is safe.—*Vanesse v. Catsburg Co. 28 Atl. 200.* The same as to the machinery.—*Myers v. Hudson Co. 150 Mass. 125; 15 Am. St. R. 176.*

He is responsible when the accident can be traced directly to his own fault or the fault of his partner.—*Mellors v. Shaw, 9 M. R. 678; 1 B. & S. 437.* And generally where traceable to the fault of the superintendent or foreman.

He is liable for overspeeding the cage.—*Jos. Taylor Co. v. Dawse, 77 N. E. 131.* And for failure to lag where lagging was customary and necessary.—*Friel v. Kimberly-Montana Co., 85 P. 734.*

It is the duty of the employer to inform an inexperienced miner of dangers known or which ought to be known.—*Low Moor Iron Co. v. La Bianca, 58 S. E. 532; Pocahontas Co. v. Williams, 54 S. E. 868.* Defendant held for allowing green hand to pick missed shot.—*Peters v. George, 154 F. 635.*

Blasting. Explosions.

It is the absolute duty of the master to give warning of a blast.—*Hjelm v. Western Gr. Co. 102 N. W. 384; Bellevue Co. v. Mooney, 39 Atl. 764; 19 M. R. 264.*

The owner is liable for accidents resulting from experimenting with new and untried fuse or explosives.—*Smith v. Oxford Co. 42 N. J. L. 467; 2 M. R.*

208; Chambers v. Chester, 72 S. W. 904; Hedlum v. Holy Terror Co. 92 N. W. 34. Or for setting new employes at work fitting caps.—*Rillston v. Mather, 44 F. 743; 156 U. S. 391.* Or storing magazines too close to works.—*Bean v. Pioneer Co. 56 Am. R. 106; Asbestos Co. v. Durand, 20 M. R. 452; 30 Can. 285.* He must use all appliances readily obtainable known to science to prevent gas explosions.—*Western Co. v. Berberich, 94 F. 329.*

Furnishing a steel bar to tamp powder is gross negligence.—*Pitts v. Wells, 101 S. W. 1192.*

Misfire.

Consideration of what is reasonable time to wait for blast.—*Eureka Co. v. Bass, 8 So. 216.* Full case on.—*Anderson v. Daly Co. 50 P. 815.*

Examination should be made and new shift notified of missed shot.—*Lane Co. v. Bauserman, 48 S. E. 857; Harris v. Balfour Co. 49 S. E. 95; Allen v. Bell, 79 P. 582.*

The Lessor is not liable for the lessee's negligence.

—*Smith v. Belshaw, 26 P. 834.* Otherwise, when he lets machinery already out of condition.—*1 Thomp. Neg. 317.*

Under Contractor.

The mine owner is not in general liable for accidents occurring under a contractor.—*Lendberg v. Brotherton Co. 42 N. W. 675; Welsh v. Lehigh Co. 5 Atl. 48.* But is liable where contractor known to be incompetent.—*Hunt v. M'Namee, 141 F. 293.*

Contributory Negligence—Co-Employee.

The mine owner, as a general rule, is not liable when the accident was in whole or in part attributable to the negligence of the party injured or to the carelessness of a fellow workman not occupying a directing or superior position to the party injured.—*Kevern v. Prov. Co. 70 Cal. 392; Ardesco Co. v. Gilson, 63 Pa. 146; 10 M. R. 669; Berea Co. v. Kraft, 31 Oh. St. 287; 10 M. R. 16; Trihay v. Brooklyn Co.*

15 M. R. 535; 4 Utah, 468; Colo. Midland Ry. v. O'Brien, 16 Colo. 220. It is not necessarily contributory negligence to use fire for comfort when dynamite is being thawed.—*Bertha Co. v. Martin, 22 S. E. 869.*

Contributory negligence is no defense to accident caused by wilful neglect of statutory duty.—*Chicago Co. v. Fidelity Co. 130 F. 957; Fulton Co. v. Wilmington Co. 133 F. 193.*

Miners working under different superintendents are not fellow-servants.—*Uren v. Golden T. Co. 21 M. R. 243; 64 P. 174.*

Negligence of fellow servant is no defense if the master knew of the danger.—*Hancock v. Keene, 32 N. E. 329.* That the accident was chargeable to a co-employe is no longer a defense in Colorado.—*R. S. §§ 2064, 2065.*

Remaining in Employ After Danger Known is held in instances to be a defense. It is sometimes classed as contributory negligence, though this is a mere abuse of terms; it is only acquiescence perhaps from moral necessity, in the negligence of the master, perhaps criminal in degree.—*Lord v. Pueblo Co. 12 Colo. 390; Davis v. Graham, 2 Colo. App. 210.* It is hard for the reasoning powers of man to conclude that this does not amount to a premium on negligence.

If the master promise to repair, the workman may rely on the promise and remain.—*Highland Boy Co. v. Pouch, 124 F. 154.*

REPLEVIN.

Ore Taken Under Claim of Title.

Where a party is in possession of a mine under a *bona fide* claim of title, the party out of possession cannot maintain replevin, or an action under the code in the nature of replevin, for the ore taken

from the same; because the trial of the right of property in the ore in such case would necessarily involve the trial of the title to real estate. The cases sustaining this proposition are cited *ante p. 341.*

In a case of replevin for ore in Montana which brought up the question of apex right, the Court took the novel position that it involved no dispute as to title and was only a matter of boundaries.—*Driscoll v. Dunwoody, 16 P. 726.*

Defendant cannot re-replevin ore.—*Morris v. DeWitt, 12 M. R. 680; 5 Wend. 71.*

INJUNCTION.

At some stage of its progress a contest over a working mine is almost sure to suggest this sort of relief. It is true that the prayer for an injunction is always to a certain extent addressed to the discretion of the Court, but the exercise of this discretion does not imply the total absence of principles applicable to the exercise of this discretion.

The Ground for the Application of Injunctive relief is that the property may be preserved pending litigation for the ultimate use of the rightful owner and may not in the meanwhile be destroyed by a trespasser. But the pendency of litigation is not of itself sufficient; the complainant must go farther and show that his case is based upon substantial facts, and that there is a probability of a decision in his favor when the cause is tried on its merits. As he asks relief in advance of the trial, it is only just that he make it appear that the trial when had will show that he was in fact entitled to this protection; and especially so when a decree of this sort, wrongfully issued, may be and often is as great an injury to the defendant as the conversion of some of the ore is to a rightful complainant.—*Capner v. Flemington Co. 7 M. R. 263; 3 N. J. Eq. 467; Clavering v. Claver-*

ing, 14 M. R. 358; 2 P. Wms. 388; Irwin v. Davidson, 7 M. R. 237; 3 Ir. Eq. 311.

Parties.

One who has a contract to sink an oil well entered into before the suit, is not bound by an injunction against his employer.—*Dunham v. Seiberling, 39 N. E. 1044.* Lessees should be made parties. —*High Inj. § 690.*

A lessee or licensee may be entitled to the protection of the writ even against the owner.—*Lytle v. James, 98 Mo. App. 337; 73 S. W. 287; Jack Harvard Co. v. Continental Co. 80 S. W. 12.*

Laches.

Further, to entitle him to injunctive relief the complainant must not have been guilty of unreasonable delay nor have allowed the defendant to proceed without objection to expend money in good faith upon the property.—*Klein v. Davis, 27 P. 511; Parrott v. Palmer, 3 M. & K. 632; Real del Monte Co. v. Pond Co. 7 M. R. 452; 23 Cal. 82; Emma Mine case, 7 M. R. 493; Field v. Beaumont, 1 Swanst. 204; 7 M. R. 257; Mammoth Co.'s Appeal, 54 Pa. 183; 7 M. R. 460; Patterson v. Hewitt, 66 P. 552; Consumers' Co. v. American Co. (Ind.) 68 N. E. 1020.*

The Solvency or Insolvency of the defendant, as well as many other circumstances applicable to particular cases, may be taken into account, but is not a controlling consideration when the case is otherwise clear.—*Lockwood v. Lunsford, 7 M. R. 532; 56 Mo. 68; Hamilton v. Ely, 4 Gill. 34; Sierra Co. v. Sears, 7 M. R. 549; 10 Nev. 346; Moore v. Ferrell, 1 Ga. 7; 7 M. R. 281; Irwin v. Davidson, 3 Ir. Eq. 311; Parker v. Furlong, 62 P. 490.*

Discretion.

The granting of the writ is so largely in the discretion of the lower court that only in an extreme case will the appellate court interfere with the order allowing or refusing it.—*Parrot S. Co. v. Heinze, 24*

Mont. 485; 21 M. R. 98; Cardelli v. Comstock Co. 21 M. R. 699; 26 Nev. 284; Vogel v. Warsing, 146 F. 949; Bush v. Pioneer Co. 154 F. 480.

The court has power to withhold the writ when the Plaintiff refuses to do equity or where it would place one party in the power of the other.—*Strobel v. Kerr Salt Co. 21 M. R. 39; 164 N. Y. 303.*

Title in Issue.

In cases where a determination of the legal title is necessary to finally decide the rights of the parties, the complaint should be framed to procure an issue of that sort; or a previous suit must be pending which will result in determining the title; or a separate action must be brought for such purpose. In the United States Courts where law and equity distinctions are strictly maintained, separate issues must always be made. If no suit be pending to try title the court may order such suit to be brought as a condition precedent to the granting of the writ.—*U. S. v. Parrott, McAll. 271; 7 M. R. 335; Grey v. Northumberland, 13 Ves. 235; 7 M. R. 250; Old Telegraph Co. v. Central Co. 1 Ut. 331; 7 M. R. 555.* And such has been the common practice in the Federal Court. —*Stevens v. Williams, 5 M. R. 449.*

A plaintiff in possession is not required to bring his action at law.—*Allen v. Dunlap, 33 P. 675.* The writ may issue to preserve the property when the issue is between contestants in an equity case.—*St. Louis Co. v. Montana Co. 58 F. 129.* The writ will not go when the plaintiff's title is not clear and the legal remedy is adequate.—*Smith v. Jamison, 3 S. W. 212.*

Where there is one case pending which brings up all questions of apex rights between the parties the filing of future actions raising such issues will be enjoined.—*Maloney v. King, 76 P. 938.*

Preservation of the Property.

The gist of the case and the foundation of equity jurisdiction is to save the property from destruction

pending the litigation.—*Thomas v. Oakley, 7 M. R. 254; 18 Ves. 184; Hess v. Winder, 34 Cal 270; West Point Co. v. Reymert, 45 N. Y. 703; 7 M. R. 528; Chapman v. Toy Long, 1 M. R. 497; 4 Saw. 28; Hoy v. Altoona Co. 136 F. 483.*

Case Sufficient to Warrant Injunction.

To reduce the matter to terms it may be stated as a proposition, supported everywhere by authority, that a temporary injunction, pending suit to try title, will issue as of right, to restrain the working of a mine, upon a case which shows, after hearing on bill, answer and testimony:

1. That the complainant has the legal title or the elder and better possessory title; or at least such showing of title as would, if proved as stated in the bill, support the verdict of a jury in an action of ejectment; and where the defense suggested in the answer does not show a recovery by plaintiff impossible as a proposition of law; and the affidavits or depositions being considered the weight of evidence is with complainant upon the question of fact; and that the defendant is in possession taking out ore (which of itself is a destruction of the estate) in such considerable quantity as to threaten irreparable injury.

St. Louis Co. v. Montana Co. 58 F. 129; Parrot Co. v. Heinze, 62 P. 818; More v. Massini, 32 Cal. 590; 7 M. R. 455; Magnet Co. v. Page Co. 9 Nev. 346; 7 M. R. 540; Lockwood v. Lunsford, 56 Mo. 68; 7 M. R. 532; Bettmann v. Harness, 18 M. R. 500; 26 S. E. 271; Erhardt v. Boaro, 15 M. R. 447; 113 U. S. 537; Anaconda Co. v. Butte Co. 43 P. 924.

2. That the bill was brought without needless delay, and that the defendant has not been allowed or encouraged to expend large sums of money upon the property, which it was in the power of complainant to prevent.

Ernest v. Vivian, 8 M. R. 205; Klein v. Davis, 27 P. 511 and other cases above cited.

And as matters more particularly addressed to the discretion of the court are the insolvency of defendant, threats of violence and danger of personal collisions, the fact of reckless mining without regard to the permanent preservation of the mine, etc.

The above propositions are made upon the supposition of an application for injunction after notice, appearance and answer.

Insufficient Case.

An injunction should not issue where defendant will suffer greater injury by the writ than plaintiff by the wrong.—*Lloyd v. Catlin Co. 71 N. E. 335.*

Where defendants are solvent and injury slight or capable of redress at law, injunction should be denied.—*King v. Mullins, 71 P. 155; Harley v. Montana Co. 71 P. 407; Hicks v. American Co. 57 Atl. 55.*

It is an abuse of discretion to enjoin the working of a vein on the mere chance that it may apex outside defendant's ground.—*Montana Co. v. Boston Co. 56 P. 120.*

The court will not enjoin a mere prospect.—*Spotts v. Gilchrist, cited in Morrison's Colo. Dig. p. 537.* Nor forbid working for exploration purposes.—*St. Louis Co. v. Montana Co. 58 F. 129.* And a writ will not be allowed against "working any vein having its apex in complainant's claim." This would require defendants to ascertain from what acts they are enjoined.—*Id.*

Injuries Other than Mining Ore.

In a proper case an injunction will issue to restrain deposit of tailings.—*Fuller v. Swan River Co. 12 Colo. 12; 16 M. R. 252.* Or the destruction of flumes or ditches.—*Power v. Klein, 27 P. 513; Miocene D. Co. v. Jacobsen, 146 F. 680.* Or to stay the running of an incline drift to cut off an adversary's tunnel.—*Montana Co. v. Clark, 16 M. R. 80; 42 F. 626.* Against assaulting workmen and threats to blow up the mine.—*Rankin's App. 16 Atl. 82.* Against sale of mining stock on the ground of its fluctuating value.—*McLure v. Sherman, 70 F. 190; Currie v. Jones, 50 S. E. 560.* Refused against cutting timber on claim where defendant solvent and the timber of no special need to the mine.—*Heaney v. Butte Co. 27 P. 379.* Refused against use of adits underly-

ing plaintiff's ground.—*Boston Co. v. Montana Co. 59 P. 919.*

Refused against upper mill where it is using all possible effort to restrain its tailings.—*Otaheite Co. v. Dean, 102 F. 929.* It may be allowed against an option holder in default on his instalments.—*Williams v. Long, 61 P. 1087.* A defendant cannot be enjoined from "entering or trespassing upon" ground of which he is already in possession.—*Id.*

Defendant enjoined from dumping with election to remove the deposited waste or pay damages.—*White v. Lansing, 103 N. Y. S. 104.*

Courts will not enjoin in cases charged with doubt or where, on the plaintiff's showing, final relief would not be granted.—*Crescent Co. v. Silver King Co. 45 P. 1093.* Though to enjoin they will not require so strong a case as on final hearing.—*Buskirk v. King, 72 F. 22.* And it may be allowed although the proving up is not yet complete.—*Maloney v. King, 64 P. 351.*

The distinction between the class of cases where Injunction will issue to restrain timber cutting and where it will be treated as a mere trespass remediable only at law is well stated in *Gray Lumber Co. v. Garkins (Ga.), 50 S. E. 164.*

The diversion of water previously appropriated for power purposes should be enjoined: decree quieting complainant's title is not adequate relief.—*Trade Dollar M. Co. v. Fraser, 148 F. 585.*

Practice—Answer Not Conclusive.

As a rule, in equity pleadings where the defendant denies the allegations of the bill in terms, the writ will not issue; but where the bill is supported by affidavits, and is filed to restrain irreparable mischief by the working of a mine, and the bill, answer and supporting affidavits being considered together, the case appears as stated—for the preservation of the subject matter of controversy and as a rule limited in its application to mining cases and others standing on analogous facts, where the substance and

not merely the use is in jeopardy—the answer is not to be taken as conclusive, if there remain to the complainant such a showing as is above stated.

Plaintiff held entitled to injunction against violence, although all allegations of complaint denied by the answer. The practice in mining litigation is liberal to enjoin to prevent either from getting unfair advantage.—*Safford v. Flemming (Ida.), 89 P. 827.*

The Venue is usually fixed by the code and commonly in the county where the land lies. When not so fixed, the court having jurisdiction over the person may enjoin the working of a mine in another county.—*Jennings v. Beale, 27 Atl. 948.* But not in another State.—*Lindsley v. Union Co. 66 P. 382; Johnstown Co. v. Butte Co. 70 N. Y. Sup. 257.* Compare *Butterfield v. Nogalez Co. 80 P. 345.*

Notice.

The usual period of notice to defendant is five days, but the statute merely requires a notice "in proportion to the urgency of the case." (Code § 164.) And where the defendant prays further time to answer, it is usual, on slight showing, to grant a restraining order or preliminary writ.

In many States the writ of injunction issues at once upon complainant's showing, and the issue comes before the court upon motion to dissolve. In Colorado a reasonable notice is required to be given before the writ can issue, which allows the defendant opportunity to file his answer; so that the argument is heard usually upon the original motion for an injunction and not upon the motion to dissolve.

FORM OF INJUNCTION NOTICE.

STATE OF COLORADO, County of *Lake:* ss.
In the District Court of said County.
Benjamin S. Phillips, Plaintiff, v. Frank M. Taylor and Thomas L. Wood, Defendants—Injunction.
To the above-named Defendants:

You and each of you will take notice that the said plaintiff will apply to *Hon. Charles Mott Cavender,* Judge of said Court, at the court house, in *Red Cliff,* County of

Eagle, in said State, at the hour of two o'clock p. m. on the 10th day of *January*, A. D. *1908*, or as soon thereafter as counsel can be heard, when and where you may attend as you see fit—for a writ of injunction to restrain and enjoin you and each of you, your agents, attorneys, lessees, sub-lessees, employees, and all persons under or in privity with you, from working, mining, extracting or carrying away ore from the *Fair Deceiver* Lode Mining Claim, situate on *Carbonate Hill*, in *California* Mining District, in said County of *Lake*, and for other relief; and that plaintiff will support the application by the complaint, affidavits, maps and documentary evidence.

Cripple Creek, January 4, 1908.

J. STANLEY JONES,
Attorney for Plaintiff.

Ex Parte Writs to enjoin the working of a mine are forbidden by statute.—*Code*, § *164*.

It has been ruled that to enjoin the sale or removal of the ore is not an injunction against mining. —*Benton v. Hopkins*, *74 P. 891*. But it is obvious that in most cases such an order would be in violation of the spirit of the Act.

Practice on Hearing.

The notice having been served, the complainant presents his bill or complaint to the court, or judge at chambers. If the complaint has not been filed or a copy served with the notice, it is usual to allow defendant a reasonable time to answer.

A demurrer is rarely interposed to a bill stating fully the complainant's case. And if interposed and not sustained, the defendant is not in position to ask for time to answer over.

The complainant with his bill, and the defendant with his answer, may file affidavits in support of the bill and answer respectively, and this is usually advisable.

The answer being presented, and denying fully the merits of the bill, the court may either hear the case on bill and answer with their supporting affidavits, or refer the matter to a master or referee to take testimony.

Consideration of Rights of Lessee losing part of term by injunction against work.—*Stahl v. Van Vleck, 41 N. E. 35; 18 M. R. 231.*

Working Under View of Court.

Where the defendant is solvent and working in minerlike manner and the case of plaintiff not free from doubt, it is not unusual for the court to allow the defendant to keep at work under conditions of accounting to the court at monthly intervals, and of submitting to the inspection of some person on behalf of plaintiff and paying the net or gross proceeds into court according to the nature of the case and the framing of the order.

Injunction After Appeal Taken.

The practice is, where the defendant in the suit or issue at law obtains judgment, to dissolve the writ; on final verdict for plaintiff to make the writ perpetual.—*Boston Co. v. Montana Co. 66 P. 752.* But the lower court has the power (though it will only be exercised in a case where the appeal has great merit or doubt) to continue the injunction after appeal taken by the plaintiff.—*Bullion Co. v. Eureka Co. 12 P. 660; Maloney v. King, 71 P. 469.* And in such case the Supreme Court will not interfere with it.—*Sheaffer's App. 100 Pa. St. 379.* But the appeal itself does not stay the writ or the suspension of the writ.—*Bullion Co. v. Eureka Co. 15 M. R. 449; 5 Ut. 151.*

The appellate Court on remanding, may direct the lower court to order the property preserved by injunction.—*Erhardt v. Boaro, 113 U. S. 537; 15 M. R. 447; Lockhart v. Leeds, 195 U. S. 427.*

The appellate Court may enjoin.—*Ajax Co. v. Triumph Co. 69 P. 523.* But will generally leave the matter to the discretion of the Court below.—*Stearns-Roger Co. v. Brown, 114 F. 940.*

On appeal from an order dissolving an injunction a supersedeas continues the writ in force.—*New River Co. v. Seeley, 117 F. 981.*

Malicious Prosecution will lie for suing out the writ without probable cause, and damages, even to the loss of anticipated profits may be allowed.—*Newark Co. v. Upson, 40 Oh. St. 17.* But it will not lie where there was probable cause.—*Wright v. Ascheim, 17 P. 125.*

Abuse of the Writ.

Where plaintiff, having obtained injunction against defendant's mining, entered upon and took possession of the defendant's works, restoration was ordered, on motion.—*Van Zandt v. Argentine Co. 48 F. 770.*

Verification.

Both bill and answer should be verified, and the answer must be sworn to even where the oath of defendant is waived by the proper clause to that effect in the bill. In the latter case the oath has not, indeed, the technical effect of a sworn answer, but the answer has its proper effect as a plea and the further effect of an affidavit of the defendant. As to verification by corporation, see *Butte Co. v. Boston Co. 24 Mont. 125.*

Bond.

The fact of a bond being filed for the relief of the defendant, if injured, is a protection to him only in theory. A bond is seldom available to the ultimate vindication of the right; it is no lien; the measure of damages is vexed and unsettled.—*Donahue v. Johnson, 37 P. 322; Coosaw Co. v. Carolina Co. 75 F. 860.* In the Federal Courts the damages may be assessed upon dissolution of the writ.—*Coosaw Co. v. Farmers Co. 51 F. 107.* There can be no recovery on the bond where the writ was rightfully issued.—*Yarwood v. Cedar Canon Co. 79 P. 483.*

Only counsel fees for obtaining the dissolution, not for defending the suit, are recoverable.—*Donahue v. Johnson, 9 Wash. 187; 37 P. 322; Montgomery v. Gilbert, 24 Mont. 121; 60 P. 1038; Quinn v. Silka, 76 P. 555.*

Measure of damage where coal mining had been stayed.—*Quinn v. Baldwin Co. 76 P. 552.*

Mandatory Writ.

Section 175 of the Colorado Code provides that where possession of a mine is taken by violence or during intervals of labor, a mandatory writ restoring possession shall issue. This Act, passed originally in 1874, has been found effective to accomplish the object intended, and the forcible dispossession of parties working a mine is now almost unheard of. It was construed and enforced in *Sprague v. Locke, 28 P. 142.*

A similar Act has been sustained by the Supreme Court of Dakota.—*Cole v. Cady, 3 N. W. 322.*

A hearing under this Act goes only to the matter of the unlawful dispossession of the plaintiff and the writ leaves the parties to their legal rights on all other questions as though no such writ had issued.

An injunction mandatory in effect and implying affirmative acts from the defendants or the surrender of possession of premises is an unusual sort of relief, to be granted with great caution, but is not without precedent, even as the result of an interlocutory decree, and without the aid of any such statute.—*Cole Co. v. Virginia Co. 7 M. R. 516; 1 Saw. 685; Lehigh Co. v. Trotter, 10 Atl. 608; Horsky v. Helena Co. 33 P. 689.*

The object of the Act is to allow the court or judge to grant speedy and practical relief whenever a party, in peaceable possession, has been ousted by force or fraud, without regard to any question, except the fact and manner of dispossession, and for this object it has been held valid and not unconstitutional by all or nearly all the judges at *nisi prius*, and has remedied one of the greatest evils ever complained of in the mining counties.

The Federal Court of Colorado District, shortly after the admission of the State, declined to accept jurisdiction under this Act. But under the principle

laid down in the later case of *Aspen Co. v. Rucker, 28 Fed. 222*, as to United States Courts exercising equity powers where conferred by State Statute it is likely that its jurisdiction in a case with proper parties would not be at this time questioned.

The practice under the statute is peculiar. As soon as the complaint is filed the court is directed *ipso facto* to grant a temporary writ restraining the working of the claim. Such mandatory legislative dictation to the judiciary is of very doubtful validity, seeming to take away all judicial discretion, but whatever be its proper construction the other provisions of the section are not hurt by this isolated provision; they refer merely to the division of time between the parties for taking testimony and for a speedy adjudication, and forbid the use of such a writ in favor of a party who procured his own possession by violation of the spirit of the Act.

In framing bills under this Act it is not advisable to pray any relief further than the preliminary writ and the restoration of possession.

At least five days' notice of application must be given; the form on *page 365* is sufficient to the words "Writ of Injunction," after which conclude as follows:

> Having the force and effect of a writ of Restitution, restoring plaintiff to the possession of the *Fatality* Lode Mining Claim, situated in *Grand Island* Mining District, County of *Boulder*, and for a Temporary Injunction restraining the working of said claim in accordance with the terms of Section 175 of the Code, and that plaintiff will support the application by the complaint and affidavits.
>
> *Boulder, January 2, 1907.* RICHARD H. WHITELY,
> Attorney for Plaintiff.

County Courts are forbidden by Colorado Statute to interfere with the enjoyment, working or possession of a mining claim.—*R. S. § 1530.*

INSPECTION AND SURVEY.

Under section 398 of the Colorado Code (see also *R. S. §§ 4218, 4230*), either party, after suit is com-

menced, is allowed the privilege of a survey and inspection of the premises held by the adverse party, after demand and refusal, and after certain awkward and useless notices and affidavits—the sections cited being probably the most complete instance of involved and turgid composition ever found on a statute book.

After analysis of its clauses and throwing out such portions as must be discarded in order to give grammatical sense to the paragraph, it seems that the procedure is as follows:

1. A demand in writing is made for permission to survey and inspect some certain portion of the premises.

2. The opposite party has three days in which to consent to or refuse this demand.

3. A refusal being had and the three days elapsed, the party presents to the court or judge a petition under oath in which he must set forth his interest in the premises and "the reason why it is necessary" that he should have such survey and inspection; stating the demand made and the refusal, and praying an order for survey and inspection.

4. The court or judge then fixes a time and place for hearing this petition and orders notice thereof to be served at least three days before the hearing.

5. On the day set the petition is argued and may be aided or resisted by affidavits.

6. The court or judge, if satisfied that the "facts stated in the petition are true," makes the order.

Three inspectors are allowed to accompany the surveyors; an interference with them is made contempt and the costs are taxed against the losing party.

This right of inspection always existed, in courts of equity at least, and has been frequently exercised. *—Ennor v. Barwell, 12 M. R. 101; 1 DeG. F. & J. 529; Lonsdale v. Curwen, 3 Bligh O. S. 168; 7 M. R. 693; Thornburgh v. Savage Co. 7 M. R. 667; Dugdale v. Robertson, 13 M. R. 662; 3 Kay & J. 695; Lewis v. Marsh, 8 Hare, 97; 8 M. R. 14; Bennitt v. White-*

house, 28 Beav. 119; 8 M. R. 17; Stockbridge Co. v. Cone Works, 6 M. R. 317; 102 Mass. 80.

A statute giving power to compel inspection is not unconstitutional or oppressive.—*St. Louis Co. v. Montana Co. 23 P. 510; 152 U. S. 160; In re Carr 35 P. 818; Howes Co. v. Howe's Ass'n, 34 N. Y. S. 848.* And it may be ordered without statute.—*Blue Bird Co. v. Murray, 23 P. 1022.*

It is now the recognized practice in mining contests, on the application of the party out of possession, to direct a survey of the mine.—*Penny v. Central Coal Co. 138 F. 769.*

Cost of pumping compelled by court to aid inspection, allowed to defendant in suit on injunction bond.—*Tyler Co. v. Last Chance Co. 90 F. 16.*

Inspection should be allowed to keep pace with development: and it may be allowed through opposing parties' shaft.—*State v. District Court, 74 P. 132.* Defendants to prove that their discovery was on a vein formation gave evidence of the formation and conditions at the Hercules Lode, a vein in the same locality in their exclusive possession, but refused permission to plaintiff to inspect the Hercules. The case was reversed for such manifest unfairness of the trial.—*Ambergris M. Co. v. Day, 85 P. 109.*

Survey Without Suit.

A statute of Montana authorizes a survey by order of Court without institution of suit and it has been held that this is due process of law.—*Montana Co. v. St. Louis Co. 152 U. S. 160.* But it requires an express statute to allow of any such unusual procedure.—*State v. Dist. Court, 68 P. 570.* And the Colorado Statute cannot be construed to allow it without a supporting suit already begun.—*Peo. v. De France, 68 P. 267.* In later cases from Montana, the Court defines the essential limitations and conditions which should be imposed on petitions of this kind.—*State v. District Court, 73 P. 230; 76 P. 206.*

It may be allowed when defendant's secret workings are approaching plaintiff's.—*State v. District Court, 68 P. 861.*

View by Jury.

Under the Colorado Code, § 206, either party may demand that the jury view the mine. The better practice of the Federal Court in the same State is never to permit it. The arguments in favor of a jury view in such cases are plausible, but not enough to offset the inconvenience and often the unfairness of such view. Barring exceptional instances, unless by the compulsion of a Statute it ought never to be allowed. But where such view has been had an appellate court may consider it conclusive as to what the jury saw on the ground.—*Ormond v. Granite Mt. Co. 28 P. 289; McCormick v. Parriott (Colo.), 80 P. 1044.*

A party to the suit may be appointed a guide to show the jury the mine.—*Wilson v. Harnette (Colo.), 75 P. 395.*

In *Golden v. Murphy, 75 P: 625,* the trial judge personally inspected the mine along with the jury, and the jury finding for the defendants the judge granted a new trial. The defendants, very justly as it seems to us, contended that this took the facts from the jury, but the appellate Court sustained the judgment on other grounds.

STATUTE OF LIMITATIONS.

Suit to Annul Patent.

Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. * * * —*A. C. March 3, 1891, Sup. p. 939.*

The above Section is construed in *Peabody Co. v. Gold Hill Co. 106 F. 241.*

Section 2332 of the United States Statutes expressly recognizes possession of a mining claim during the period fixed by the State Act as sufficient to

establish a right thereto.—*420 Mining Co. v. Bullion Co. 9 Nev. 240; 1 M. R. 114.* And a claim may be sued for under the title so developed.—*Glacier Mt. Co. v. Willis, 127 U. S. 472; 17 M. R. 127.* Such title by continued possession is equivalent to location.—*Altoona Co. v. Integral Co. 45 P. 1047.*

Adverse possession for the statutory period gives title.—*Cox v. Clough, 70 Cal. 345; Harriman Co. v. Butterfield Co. 57 P. 537; Lavagnino v. Uhlig, 71 P. 1046.*

The apparently clear construction of Sec. 2332 is that in *ex parte* cases an applicant for patent may rely on his continued possession without producing abstract of title, and that a party in like position could adverse on the same ground.—*29 L. D. 401.* And that if an adverse claim was filed, in the suit supporting such adverse either party could rely on such possession until defeated by the production of some superior title. And such is the import of all the above citations. But in Montana and Colorado the section has been construed as a mere permission to support patent applications on possession, in non-contested cases.—*McCowan v. McLay, 40 P. 602; Cleary v. Skiffich, 21 M. R. 284.*

Seven years complete the bar of the Statute in Colorado, (*R. S. §§ 4084-4093*), and all taxes must be paid.—*Eberville v. Leadville Co. 64 P. 200.* The period varies in every state, in Nevada being as low as two years.—*South End Co. v. Tinney, 35 P. 89; 38 P. 401.* And in Montana only one year as to possessory claims.—*Horst v. Shea, 59 P. 364.*

The possession of the claim must be open and notorious.—*Hamilton v. S. Nevada Co. 15 M. R. 314; 33 F. 562.* And exclusive and hostile.—*Tyee M. Co. v. Langstedt, 121 F. 710.* Secret underground mining will not start the bar.—*Pierce v. Barney, 58 Atl. 152.*

The continuous working of a mine, or even its working during successive seasons with intervening seasons during which the mine is left idle, according to the custom of the country, is as complete an adverse possession as could be gained by agricultural

operations or other acts of possession.—*Stephenson v. Wilson, 37 Wis. 482; 13 M. R. 408; Wilson v. Henry, 1 M. R. 152; 35 Wis. 241; 1 M. R. 157; 40 Wis. 594; 420 M. Co. v. Bullion Co. 11 M. R. 608; 3 Saw. 634; Bell v. Denson, 56 Ala. 444.*

In the case of *Harris v. Equator Co.*, cited *p. 350*, it was intimated in the opinion of the court, HALLETT, J., that where a party had been in possession of a mining claim for the period of the statute of limitations, such fact raised a presumption, at least against a wrongdoer, that he held under a valid location, without proof of the various acts of location, and such must from the nature of things be the ultimate decision of all courts upon this point.

As to the running of the statute where money is to be paid out of the proceeds of the mines, *see Charter Oak Co. v. Stephens, 15 P. 254.*

The statute of limitations does not begin to run while the title is in the United States, except as between parties both of whom claim by possessory title only.—*King v. Thomas, 12 P. 865; Weibold v. Davis, 14 P. 865.* Nor until the patent actually issues.—*South End Co. v. Tinney, 38 P. 401; Clark v. Barnard, Id. 834.*

To make adverse possession available there must be:

1. The occupation or use of the land.
2. Claim and color of title.

It has been ruled that a party following a patented vein on its strike beyond its side lines has not sufficient color of title to maintain such defense.—*Lebanon Co. v. Rogers, 8 Colo. 34.* And that mining on a vein apexing outside the party's claim is not adverse possession.—*Davis v. Shepherd, 72 P. 57.*

Possession under title bond gives claim and color after payment of purchase money.—*Woods v. Montevallo Co. 84 Ala. 560; 5 Am. St. R 393.*

In instances the title may ripen without being initiate on any paper.—*Minnesota Co. v. Brasier, 45 P. 632; Risch v. Wiseman, 59 P. 1111.*

As to actions of trespass for coal or ore taken but the fact not ascertained by plaintiff within the statutory period—*see Lewey v. Frick Co. 31 Atl. 261; 18 M. R. 179; Williams v. Pomeroy Co. 6 M. R. 195; 37 Oh. St. 583.*

And as to that class of cases (as in secret undermining) where a long interval may elapse before the resulting injury, see *Hall v. Duke of Norfolk, L. R. (1900), 2 Ch. 493; Sterrett v. Northport Co. 70 P. 266; Noonan v. Pardee, 21 M. R. 517; 200 Pa. 474.*

In Pennsylvania it was held that the statute began to run "when the support of the surface was so weakened that it might fall."—*Tischle v. Penn. C. Co. 66 Atl. 988.*

BUREAU OF MINES—COMMISSIONER—INSPECTOR.

By *R. S. Colo.*, section *4259-4306*, are prescribed the duties of the Bureau of Mines, of the Commissioner of Mines and three Inspectors of metalliferous mines with strict provisions for safeguarding.

They regulate the storage of explosives, escapeways, compartment shafts, signals and ventilators, and forbid the use of iron tamping bars.

They require all serious accidents to be reported and investigated and provide penalties for failure to comply with the provisions of the act.

ASSAYS.

Gold, silver and platinum are assayed for the number of ounces per ton of ore; lead, copper, zinc and the base metals generally for the per cent. of the minerals in the ore.

An assay is the test of the value of a specimen or quantity of ore by the extraction of the amount

of silver, gold or other metal, contained in a minute but exact fraction, which amount is supposed to be proportionate to the whole amount found in the quantity from which the fraction was obtained. Supposing the assay to be correct its importance in determining the quantity of metal in the ore of the mine, or the value of the mine as deduced from its ore product, depends on the size of the lot from which it was obtained, and the manner in which such lot was selected. What are called specimen assays are of no value whatever, further than to show the contents of the identical specimen from which made, but are often used to deceive persons ignorant in such matters.

While the assay shows only the contents of that portion of ore that has been assayed, its importance lies in its acceptance as indicating the contents of other ore, of which the portion assayed was a "sample."

Between buyer and seller ore is usually sampled by the former, under supervision of the latter, if he choose to be present. The sample taken (pulverized) is divided into portions—one for the buyer, one for the seller, and one to be kept for reference in case of difference between the other two. After division, each portion is in itself a sample. Both buyer and seller have a control assay (assay in duplicate) made of their respective samples. The sale is customarily made on the assay of the buyer, and the sample of the seller is intended for a check on the assay of the buyer.

The results of carefully made assays should not differ more than two oz. silver or two tenths oz. gold except where the ore contains much free gold, native silver or silver glance, the particles of which cannot be reduced to exact evenness, and make assays of these classes of ore treacherous. In case of disagreement, the third portion of the original sample, called the umpire, is tested by a third party for a control, and this assay is final unless there be such unusual and excessive variation as to suggest the necessity of resampling.

The intent of an assay is to show the true value of the ore, and if it is so taken as not to show such value, proof of assays otherwise taken may be given in evidence.—*Phipps v. Hully, 15 M. R. 350; 18 Nev. 133.* Difference in results of wet and fire assays.—*In re Puget Co. 96 F. 90.*

Sales based on assay are not bound by the assay in case of gross error.—*Cox v. Prentice, 3 M. & S. 344.* As to the custom of assayers, and of which party, if of either, he is the agent, see this case and *Trotter v. Heckscher, 40 N. J. Eq. 612; 42 Id. 251.* As to deductions for moisture see this litigation continued in *Lehigh Co. v. Trotter, 42 N. J. Eq. 661.* Sufficient proof by assay that samples were salted with powdered silver.—*Mudsill Co. v. Watrous, 61 F. 163.* By assay with litharge, a trace of silver may be shown in any kind of rock.—*Ormond v. Granite Mt. Co. 28 P. 289.* An assay of two lots is no proof of the value of a series of shipments.—*Pittsburg Co. v. Glick, 42 P. 188.* Method of sampling and assay on ore sales described.—*Chisholm v. Eagle Ore Co. 144 F. 670.*

A purchaser of phosphate rock is entitled to deductions for its falling below agreed assay, and is not bound to accept at all if materially short.—*Stone Mines v. Southern Co. 56 S. E. 982.*

Mill samples control car samples.—*Vietti v. Nesbitt, 41 P. 151; Fox v. Hale Co. 41 P. 308.* The "Assay value" of gold means its universal standard value and not the value of local gold bullion.—*Id.* But a contract to pay 95 per cent. of the silver contents of the "product of said ore" does not mean 95 per cent. of the assay value of the raw ore.—*Silver Co. v. N. C. Sm. Co. 29 S. E. 940.*

An assay is material proof on an issue as to whether certain rock is mineral bearing.—*Healey v. Rupp, 63 P. 319.*

SCHOOL OF MINES.

The General Assembly may provide that the Science of Mining and Metallurgy be taught in one or more of the institutions of learning under the patronage of the State.—*Colo. Const. Art. 16, Sec. 4.*

Under the above provision the "School of Mines" at *Golden* is especially incorporated, and is supported by the State.

Its declared object is to furnish "such instruction as is provided for in like technical schools of a high grade," and it is authorized to confer degrees.

The course includes four years of two terms each. These are divided, after the second year, into Mining and Metallurgical Engineering.

Similar State schools are established at *Rolla*, Missouri; *Houghton*, Michigan; *Rapid City*, South Dakota; *Butte*, Montana; *Moscow*, Idaho; *Blake*, Utah, and *Socorro*, New Mexico.

The Universities of Arizona, California, Nevada, North Dakota and Wyoming have special departments covering the same ground.

LAND OFFICE REGULATIONS.

Re-Issued by the General Land Office, May 21, 1907.

NATURE AND EXTENT OF MINING CLAIMS.

1. Mining claims are of two distinct classes: Lode claims and placers.

LODE CLAIMS.

2. **The status of lode claims located or patented previous** to the 10th day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged by sections 2322 and 2328, by investing the locator, his heirs or assigns, with the right to follow, upon the conditions stated therein, all veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his claim.

3. **It is to be distinctly understood, however, that the law** limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May 10, 1872,* and that where such other vein or ledge was so adversely claimed at that date the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

4. **From and after the 10th May, 1872, any person who is** a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet,* but in no event can a location of a vein or lode made after the 10th day of May, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

5. **Width—Surface Ground.**—With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface,* and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral

measurements can not extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet can not be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

6. Size of Claim.—By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

7. Location Certificate.—Locators can not exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

8. No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

9. Discovery—Ties—Description.—The claimant should therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the descrip-

tion thereof given in the record of locations in the district, and should be duly recorded.

10. Adjoining Claims—Staking—Location Notice.—In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

11. The location notice must be filed for record in all respects as required by the State or Territorial laws and local rules and regulations, if there be any.

12. Annual Labor.—In order to hold the possessory title to a mining claim located prior to May 10, 1872, the law requires that *ten dollars* shall be expended annually in labor or improvements for each *one hundred feet* in length along the vein or lode. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made thereon annually. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Where a number of contiguous claims are held in common, the aggregate expenditure that would be necessary to hold all the claims, may be made upon any one claim. Cornering locations are held not to be contiguous.

13. Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns or legal representatives have resumed work after such failure and before relocation.

14. Annual expenditure is not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

15. Forfeiture of Coowner's Interest.—Upon the failure of any one of several coowners to contribute his proportion of the required expenditures, the coowners, who have performed the labor or made the improvements as required, may, at the expiration of the year, give such delinquent coowner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the ex-

piration of one hundred and eighty days after the first newspaper publication of notice, the delinquent coowner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his coowners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving date and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent coowner failed to contribute his proper proportion within the period fixed by the statute.

TUNNELS.

16. The effect of section 2323, Revised Statutes, is to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

17. Tunnel Notice—Staking.—To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

18. Record of Tunnel.—A full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

PLACER CLAIMS.*

19. But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.

20. Building Stone—School Lands.—The act of August 4, 1892, extends the mineral-land laws so as to bring lands chiefly valuable for building stone within the provisions of said law by authorizing a placer entry of such lands. Registers and receivers should make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. Lands reserved for the benefit of public schools or donated to any State are not subject to entry under said act.

21. Petroleum—Oils.—The act of February 11, 1897, provides for the location and entry of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

22. Ten-acre Tracts.—By section 2330 authority is given for sub-dividing forty-acre legal subdivisions into ten-acre tracts. These ten-acre tracts should be considered and dealt with as legal subdivisions, and an applicant having a placer claim which conforms to one or more of such ten-acre tracts, contiguous in case of two or more tracts, may make entry thereof after the usual proceedings, without further survey or plat.

23. Must be in Square Form.—In subdividing forty-acre legal subdivisions, the ten-acre tracts must be in square form, with lines at right angles with the lines of the public surveys; and the notice given of the application must be specific and accurate in description.

24. How Described—Improvements.—A ten-acre subdivision may be described, for instance, if situated in the extreme northeast of the section, as the "NE. ¼ of the

*See, also, Regulations 58-60.

NE. ¼ of the NE. ¼" of the section, or, in like manner, by appropriate terms, wherever situated; but, in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. The proofs submitted with applications must show clearly the character and extent of the improvements upon the premises.

25. The proof of improvements must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors. This proof should consist of the affidavit of two or more disinterested witnesses. The annual expenditure to the amount of $100, required by section 2324, Revised Statutes, must be made upon placer claims as well as lode claims.

26. Lode in Placer.—Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat, the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. An application which omits to claim such known vein or lode must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

27. Size of Claim.—By section 2330 it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

28. Conform to Public Survey.—Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys, and such locations shall not include more than twenty acres for each individual claimant.

29. Location by an Association.—The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed twenty acres for each individual participating therein; that is, a location by two persons can not exceed forty acres, and one by three persons can not exceed sixty acres.

30. How Located.—The regulations hereinbefore given as to the manner of marking locations on the ground, and

placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that all placer mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands.

REGULATIONS UNDER SALINE ACT.

31. Only One Location Allowed to Same Person.—Under the act approved January 31, 1901, extending the mining laws to saline lands, the provisions of the law relating to placer-mining claims are extended to all States and Territories and the district of Alaska, so as to permit the location and purchase thereunder of all unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, with the proviso, "That the same person shall not locate or enter more than one claim hereunder."

32. Rights obtained by location under the placer-mining laws are assignable, and the assignee may make the entry in his own name; so, under this act a person holding as assignee may make entry in his own name: *Provided*, He has not held under this act, at any time, either as locator or entryman, any other lands; his right is exhausted by having held under this act any particular tract, either as locator or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

33. Affidavit to Location Certificate.—In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the notice of location presented for record and the application for patent must each contain a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located or entered any other lands under the provisions of this act. Assignments made by persons who are not severally qualified as herein stated will not be recognized.

PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

LODE CLAIMS.

34. Official Survey.—The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes in each case will be prepared by the surveyor-general; one plat and the original field notes to be retained in the office of the surveyor-general, one copy of the plat to be

given the claimant for posting upon the claim, one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district, to be retained on his files for future reference. As there is no resident surveyor-general for the State of Arkansas, applications for the survey of mineral claims in said State should be made to the Commissioner of this office, who, under the law, is *ex officio* the U. S. surveyor-general.

35. Idem—None Before Record.—The survey and plat of mineral claims required to be filed in the proper land office with application for patent must be made subsequent to the recording of the location of the claim (if the laws of the State or Territory or the regulations of the mining district require the notice of location to be recorded), and when the original location is made by survey of a United States mineral surveyor such location survey can not be substituted for that required by the statute, as above indicated.

36. Numbering Surveys—Ties to Government Corners.—The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length, and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line or traverse line must be surveyed by the mineral surveyor at the time of his making the particular survey, and be made a part thereof.

37. *(a)* **Promptly upon the approval of a mineral survey** the surveyor-general will advise both this office and the appropriate local land office, by letter (Form 4-286), of the date of approval, number of the survey, name and area of the claim, name and survey number of each approved mineral survey with which actually in conflict, name and address of the applicant for survey, and name of the mineral

surveyor who made the survey; and will also briefly describe therein the *locus* of the claim, specifying each legal subdivision or portion thereof, when upon surveyed lands, covered in whole or in part by the survey; but hereafter no segregation of any such claim upon the official township-survey records will be made until mineral entry has been made and approved for patent, unless otherwise directed by this office.

(b) Upon application to make agricultural entry of the residue of any original lot or legal subdivision of forty acres, reduced by mining claims for which patent applications have been filed and which residue has been already relotted in accordance therewith, the local officers will accept and approve the application as usual, if found to be regular. When such an application is filed for any such original lot or subdivision, reduced in available area by duly asserted mining claims but not yet relotted accordingly, the local officers will promptly advise this office thereof; and will also report and identify any pending application for mineral patent, affecting such subdivision, which the agricultural applicant does not desire to contest. The surveyor-general will thereupon be advised by this office of such mining claims, or portions thereof, as are proper to be segregated and directed to at once prepare, upon the usual drawing-paper township blank, diagram of amended township survey of such original lot or legal forty-acre subdivision so made fractional by such mineral segregation, designating the agricultural portion by appropriate lot number, beginning with No. 1 in each section and giving the area of each lot, and will forthwith transmit one approved copy to the local land office and one to this office. In the meantime the local officers will accept the agricultural application (if no other objection appears), suspend it with reservation of all rights of the applicant if continuously asserted by him, and upon receipt of amended township diagram will approve the application (if then otherwise satisfactory) as of the date of filing, corrected to describe the tract as designated in the amended survey.

(c) The register and receiver will allow no agricultural claim for any portion of an original lot or legal forty-acre subdivision, where the reduced area is made to appear by reason of approved surveys of mining claims and for which applications for patent have not been filed, until there is submitted by such agricultural applicant a satisfactory showing that such surveyed claims are in fact mineral in character; and applications to have lands asserted to be mineral, or mining locations, segregated by survey, with the view to agricultural appropriation of the remainder, will be made to the register and receiver for submission to the Commissioner of the General Land Office, for his consideration and direction, and must be supported by the affidavit of the party in interest, duly corroborated by two or more disinterested persons, or by such other or further evidence as may be required in any case, that the lands sought to be segregated *as mineral* are in fact mineral in character: otherwise, in the absence of satisfactory showing in any

such case, such original lot or legal subdivision will be subject to agricultural appropriation only. When any such showing shall be found to be satisfactory and the necessary survey is had, amended township diagram will be required and made as prescribed in the preceding section.

38. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on the vein in each direction from the point of discovery or other well-defined place on the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim.....	10.50
Area in conflict with Survey No. 302..	1.56
Area in conflict with Survey No. 948..	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed.....	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. The application for patent should state the portions to be excluded in express terms.

39. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat of survey. Too much care can not be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent.

40. Proof of Posting.—After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the

date and place of such posting; a copy of the *notice* so posted to be attached to and form a part of said affidavit.

41. Application for Patent.—Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

42. Abstract of Title.—This sworn statement must be supported by a copy of the location notice, certified by the officer in charge of the records where the same is recorded, and where the applicant for patent claims the interests of others associated with him in making the location, or as a purchaser, in addition to the copy of the location notice, must be furnished a complete abstract of title as shown by the record in the office where the transfers are by law required to be recorded, certified to by the officer in charge of the record under his official seal. The officer should also certify that no conveyances affecting the title to the claim in question appear of record other than those set forth in the abstract, which abstract shall be brought down to the date of the application for patent. Where the applicant claims as sole locator and does not furnish an abstract of title, his affidavit should be furnished to the effect that he has disposed of no interest in the land located.

43. Lost Records.—In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, &c.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

44. Two Applications for Same Land.—Before receiving and filing an application for mineral patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

Mineral Location on Railroad Grants.

Local officers will give prompt and appropriate notice to the railroad grantee of the filing of every application for mineral patent which embraces any portion of an odd-numbered section of surveyed lands within the primary limits of a railroad land grant, and of *every* such application embracing *any* portion of unsurveyed lands within such limits (except as to any such application which embraces a portion or portions of those ascertained or prospective odd-numbered sections only, within the limits of the grant in Montana and Idaho to the Northern Pacific Railroad Company, which have been classified as mineral under the act of February 26, 1895, without protest by the company within the time limited by the statute or the mineral classification whereof has been approved).

Should the railroad grantee file protest and apply for a hearing to determine the character of the land involved in any such application for mineral patent, proceedings thereunder will be had in the usual manner.

Any application for mineral patent, however, which embraces lands previously listed or selected by a railroad company will be disposed of as provided by the first section of this paragraph, and the applicant afforded opportunity to protest and apply for a hearing or to appeal.

Notice should be given to the duly authorized representative of the railroad grantee, in accordance with Rule 17 of Practice. When the claims applied for are upon unsurveyed land, the burden of proving that they are situate within prospective odd-numbered sections will rest upon the railroad.

Evidence of service of notice should be filed with the record in each case.

45. Publication—Publisher's Agreement.—Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper, nine consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

46. The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances.

47. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

48. Surveyor-General's Certificate of $500 Improvements.— The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register, a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several contiguous locations held in common, that an amount equal to five hundred dollars for each location, has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will if incorporated in a patent serve to fully identify the premises and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof: *Provided*, That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

49. The surveyor-general may derive his information upon which to base his certificate as to the value of labor expended or improvements made from the mineral surveyor who makes the actual survey and examination upon the premises, and such mineral surveyor should specify with particularity and full detail the character and extent of such improvements, but further or other evidence may be required in any case.

50. It will be convenient to have this certificate indorsed by the surveyor-general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

51. Proof of Publication and of Plat Remaining Posted.— After the sixty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

52. Entry—Price—Proof of Sums Paid.—Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication and no other objection appears, permit the claimant to pay for

the land to which he is entitled at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

53. Protest Prior to Patent.—At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings Such protest can not, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a coowner excluded from an application for patent does not have an "adverse" claim within the meaning of sections 2325 and 2326 of the Revised Statutes. See *Turner v. Sawyer, 150 U. S. 578-586.*

54. Any party applying for patent as trustee must disclose fully the nature of the trust and the name of the *cestui que trust;* and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

55. The annual expenditure of one hundred dollars in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts.

56. Failure to Prosecute Application Diligently.—The failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

57. Idem—Prosecution Delayed by Adverse.—The proceedings necessary to the completion of an application for patent to a mining claim, against which an adverse claim or pro-

test has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

PLACER CLAIMS.*

58. On Surveyed Lands.—The proceedings to obtain patents for placer claims, including all forms of mineral deposits excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where a placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required. Where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

59. Two Dollars and Fifty Cents Per Acre.—The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; the price of placer claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

60. Classification of the Land—Descriptive Report.—In placer applications for patent care must be exercised to determine the proper classification of the lands claimed. To this end the clearest evidence of which the case is capable should be presented.

(1) If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

(2) Mineral surveyors shall at the expense of the parties make full examination of all placer claims surveyed by them, and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claim. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

(3) In addition to these data, which the law requires to be shown in all cases, the mineral surveyor should report with reference to the proximity of centers of trade or residence; also of well-known systems of lode deposit or

*See, also, Regulations 19-30.

of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and, finally, what works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(4) This examination should be reported by the mineral surveyor under oath to the surveyor-general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

(5) Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to examination as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

MILL SITES.

61. Land entered as a mill site must be shown to be nonmineral. Mill sites are simply auxiliary to the working of mineral claims, and as section 2337, which provides for the patenting of mill sites, is embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

62. Noncontiguous to Lode—Independent Application.—To avail themselves of this provision of law parties holding the possessory right to a vein or lode, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to the vein or lode claim, such noncontiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may, by an independent application, secure a mill site if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

63. Lots "A" and "B."—Where the original survey includes a lode claim and also a mill site the lode claim should be described in the plat and field notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode claim for the statutory period

of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

64. Mill Site Without Lode.—In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode claim the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

65. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable from acquaintance with the land, to testify understandingly.

CITIZENSHIP.

66. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

67. In case of an individual or an association of individuals who do not appear by their duly authorized agent, the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence, will be required.

68. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

69. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land district; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any State or Territory.

70. Proof by Disinterested Witnesses.—If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

71. **Scrutiny of Proofs.**—No entry will be allowed until the register has satisfied himself, by careful examination, that proper proofs have been filed upon the points indicated in the law and official regulations. Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the transferee of such applicant where a transfer has been made pending the application for patent.

72. **The consecutive series of numbers of mineral entries** must be continued, whether the same are of lode or placer claims or mill sites.

73. **Register's Certificate of Posting in Land Office—Plat.**—In sending up the papers in a case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued. The plat forwarded as part of the proof should not be *folded*, but *rolled*, so as to prevent creasing, and either transmitted in a separate package or so enclosed with the other papers that it may pass through the mails without creasing or mutilation. If forwarded separately, the letter transmitting the papers should state the fact.

POSSESSORY RIGHT.

74. **Chain of Title Broken, but Possession Clear.**—The provisions of section 2332, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

75. **Details of Proof in Such Case.**—When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

76. **There should likewise be filed a certificate, under seal** of the court having jurisdiction of mining cases within

the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid, other than that which has been finally decided in favor of the claimant.

77. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

ADVERSE CLAIMS.

78. An adverse claim must be filed with the register and receiver of the land office where the application for patent is filed, or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.

79. Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

80. The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

81. The adverse claim so filed must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

82. Plat of Conflict—Legal Subdivisions.—In order that the *"boundaries"* and *"extent"* of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict: *Provided, however,* That if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without fur-

ther survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a mineral surveyor, and its correctness officially certified thereon by him.

83. Notice of Filing Adverse.—Upon the foregoing being filed within the sixty days' period of publication, the register, or in his absence the receiver, will immediately give notice in writing to *the parties* to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits.

84. Adverse Stays Proceedings.—When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be stayed, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been finally adjudicated in court, or the adverse claim waived or withdrawn.

85. Copy of Judgment.—Where an adverse claim has been filed and suit thereon commenced within the statutory period, and final judgment rendered determining the right of possession, it will not be sufficient to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment roll, together with the other evidence required by section 2326, Revised Statutes.

86. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

87. Relinquishment After Adverse.—After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment of the adverse claim will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

88. Certificate of No Suit Brought.—Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required.

APPOINTMENT OF SURVEYORS FOR SURVEY OF MINING CLAIMS —CHARGES FOR SURVEYS AND PUBLICATIONS—FEES OF REGISTERS AND RECEIVERS, ETC.

89. Newspaper Charges.—Section 2334 provides for the appointment of surveyors to survey mining claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications. Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

(1) Where a daily newspaper is designated the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body type used for advertisements.

(2) For the publication of citations in contests or hearings involving the character of lands the charges shall not exceed eight dollars for five publications in weekly newspapers or ten dollars for publications in daily newspapers for thirty days.

90. Appointment of Mineral Surveyors—Bond.—The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many competent surveyors for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The statute provides that the claimant shall also be at liberty to employ any United States mineral surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into a bond of not less than $1,000 for the faithful performance of his duties.

91. Surveyor-General's Fees.—With regard to the *platting* of the claim and other *office work* in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

92. Surveyors for Each District.—The surveyors-general will endeavor to appoint surveyors to survey mining claims, so that one or more may be located in each mining district for the greater convenience of miners.

93. The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them.

The duty of the surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors-general and local land officers are expected to report any infringement of this regulation to this office.

94. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

95. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., paragraph 9.)

96. Receipt for Fees.—At the time of payment of fee for mining application or adverse claim the receiver will issue his receipt therefor in duplicate, one to be given the applicant or adverse claimant, as the case may be, and one to be forwarded to the Commissioner of the General Land Office *on the day of issue*. The receipt for mining application should have attached the certificate of the register that the lands included in the application are subject to such appropriation, as far as shown by the records of his office.

97. Monthly Reports to General Land Office.—ter and receiver will, at the close of each month, forward to this office an abstract of mining applications filed, an abstract of adverse claims filed, an abstract of mineral lands sold, and a report of receipts from such sales.

98. The fees and purchase money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

HEARINGS TO DETERMINE CHARACTER OF LANDS.

99. The Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the character of lands.

100. Agricultural Entry of Lands Returned as Mineral.—Public land returned by the surveyor-general as mineral shall be withheld from entry as agricultural land until the

presumption arising from such a return shall be overcome by testimony taken in the manner hereinafter described.

101. Hearings to determine the character of lands are practically of two kinds, as follows:

(1) Lands returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

(Paragraphs 102 to 104, inclusive, are omitted from this revision of the regulations, as appropriate instructions relative to nonmineral proofs in railroad, state and forest lieu selections are contained in separate circulars.)

105. Examination of Witnesses.—At hearings to determine the character of lands, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow-surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done,

and at what time the land was abandoned for mining purposes, if abandoned at all.

106. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised: also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

107. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of minerals were first known to exist on the lands.

108. Segregating Mineral from Agricultural Land.—When the case comes before this office, such decision will be made as the law and the facts may justify. In cases where a survey is necessary to set apart the mineral from the agricultural land, the proper party, *at his own expense*, will be required to have the work done by a reliable and competent surveyor to be designated by the surveyor-general. Application therefor must be made to the register and receiver, accompanied by description of the land to be segregated and the evidence of service upon the opposite party of notice of his intention to have such segregation made. The register and receiver will forward the same to this office, when the necessary instructions for the survey will be given. The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, United States Revised Statutes, as to length and width and parallel end lines.

109. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

110. Verified Plat by Surveyor-General.—Upon the filing of the plat and field notes of such survey with the register and receiver, duly sworn to as aforesaid, they will transmit the same to the surveyor-general for his verification and approval; who, if he finds the work correctly performed, will furnish authenticated copies of such plat and description both to the proper local land office and to this office, made upon the usual drawing-paper township blank.

The copy of plat furnished the local office and this office must be a diagram verified by the surveyor-general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the

same as provided in paragraph 37 in the survey of mining claims on surveyed lands.

111. Proceedings if Land Decided to Be Mineral.—The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land, he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the General Land Office.

DISTRICT OF ALASKA.

112. Section 13, act of May 14, 1898, according to native-born citizens of Canada "the same mining rights and privileges" in the district of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

113. For the sections of the act of June 6, 1900, making further provision for a civil government for Alaska, which provide for the establishment of recording districts and the recording of mining locations; for the making of rules and regulations by the miners and for the legalization of mining records; for the extension of the mining laws to the district of Alaska, and for the exploration and mining of tide lands and lands below low tide; and relating to the rights of Indians and persons conducting schools or missions, see page 21 of this circular *(31 L. D. p. 470)*.

MINERAL LANDS WITHIN FOREST RESERVES.

114. The act of June 4, 1897, provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

The act also provides that, "The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located."

For further instructions under this act see circular of April 4, 1900 (30 L. D. 23, 28-30).

SURVEYS OF MINING CLAIMS.

GENERAL PROVISIONS.

115. Appointment of Surveyors.—Under section 2334, U. S. Rev. Stats., the U. S. Surveyor-general "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims."

116. Persons desiring such appointments should therefore file their applications with the surveyor-general for the district wherein appointment is asked, who will furnish all information necessary.

117. All appointments of mineral surveyors must be submitted to the Commissioner of the General Land Office for approval.

118. Suspension of Surveyors.—The surveyors-general have authority to suspend or revoke the commissions of mineral surveyors for cause. Before final action, however, the matter should be submitted to the Commissioner of the General Land Office for approval.

119. Such surveyors will be allowed the right of appeal from the action of the surveyor-general in the usual manner. Such appeal should be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office.

120. Investigation of Surveyor's Charges.—Neither the surveyor-general nor the Commissioner of the General Land Office has jurisdiction to settle differences, relative to the payment of charges for field work, between mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner, *i. e.*, in the local courts. The Department has, however, authority to investigate charges affecting the official actions of mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment.

121. The surveyors-general should appoint as many competent mineral surveyors, as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms.

122. The schedule of charges for office work should be as low as is possible. No additional charges should be made for orders for amended surveys, unless the necessity therefor is clearly the fault of the claimant, or considerable additional office work results therefrom.

123. In cases where the error in the original survey is due to the carelessness or neglect of the surveyor who made it, he should be required to make the necessary corrections in the field at his own expense, and the surveyor-general should advise him that the penalty for failure to comply with

instructions within a specified time will be the suspension or revocation of his commission.

124. Mineral surveyors will address all official communications to the surveyor-general. They will, when a mining claim is the subject of correspondence, give the name and survey number. In replying to letters they will give the subject-matter and date of the letter. They will promptly notify the surveyor-general of any change in post-office address.

125. Mineral surveyors should keep a complete record of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field notes and other reports must be written in a clear and legible hand or typewritten, in non-copying ink, and upon the proper blanks furnished gratuitously by the surveyor-general's office upon application therefor. No interlineations or erasures will be allowed.

126. No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States mineral surveyor, and made in pursuance of a special order from the surveyor-general's office. After he has received an order for survey he is required to make the survey and return correct field notes thereof to the surveyor-general's office without delay.

127. Claimant Contracts With Deputy.—The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same.

128. Surveyor Not Act as Attorney.—A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His duty in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat, with his report, to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the same case by administering oaths to the parties in interest. It is preferable that both preliminary and final oaths of assistants should be taken before some officer duly authorized to administer oaths, other than the mineral surveyor. In cases, however, where great delay, expense, or inconvenience would result from a strict compliance with this rule the mineral surveyor is authorized to administer the necessary oaths to his assistants, but in each case where this is done, he will submit to the proper surveyor-general a full written report of the circumstances which required his stated action: otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will make no sur-

vey of a mineral claim in which he holds an interest, nor will he employ chainmen interested therein in any manner.

SURVEY—HOW MADE.

129. Survey Must Be Actual.—The survey made and returned must, in every case, be an actual survey on the ground in full detail, made by the mineral surveyor in person after the receipt of the order, and without reference to any knowledge he may have previously acquired by reason of having made the location survey or otherwise, and must show the actual facts existing at the time. This precludes him from calculating the connections to corners of the public survey and location monuments, or any other lines of his survey through prior surveys made by others and substituting the same for connections or lines of the survey returned by him. The term *survey* in this paragraph applies not only to the usual field work, but also to the examinations required for the preparation of affidavits of five hundred dollars expenditure, descriptive reports on placer claims, and all other reports.

130. The survey of a mining claim may consist of several contiguous locations, but such survey must, in conformity with statutory requirements, distinguish the several locations, and exhibit the boundaries of each. The survey will be given but one number.

131. The survey must be made in strict conformity with, or be embraced within, the lines of the location upon which the order is based. If the survey and location are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of survey to the corresponding corner of the location, and the location corner must be fully described, so that it can be identified. The lines of the location, as found upon the ground, must be laid down upon the preliminary plat in such a manner as to contrast and show their relation to the lines of survey.

132. Corners Not to Be Changed.—In view of the principle that courses and distance must give way when in conflict with fixed objects and monuments, the surveyor will not, under any circumstances, change the corners of the location for the purpose of making them conform to the description in the record. If the difference from the location be slight, it may be explained in the field notes.

133. Not Exceed Statutory Length and Width.—No mining claim located subsequent to May 10, 1872, should exceed the statutory limit in width on each side of the center of vein or 1,500 feet in length, and all surveys must close within 50-100 feet in 1,000 feet, and the error must not be such as to make the location exceed the statutory limit, and in absence of other proof the discovery point is held to be the center of the vein on the surface. The course and length of the vein should be marked upon the plat.

134. Instrument—True Meridian.—All mineral surveys must be made with a transit, provided with a solar attach-

ment, by which the meridian can be determined independently of the magnetic needle, and all courses must be referred to the true meridian. The variation should be noted at each corner of the survey. The true course of at least one line of each survey must be ascertained by astronomical observations made at the time of the survey; the data for determining the same and details as to how these data were arrived at must be given. Or, in lieu of the foregoing the survey must be connected with some line the true course of which has been previously established beyond question, and in a similar manner, and, when such lines exist, it is desirable in all cases that they should be used as a proof of the accuracy of subsequent work.

135. Ties to Public Survey.—Corner No. 1 of each location embraced in a survey must be connected by course and distance with nearest corner of the public survey or with a United States location monument, if the claim lies within two miles of such corner or monument. If both are within the required distance the connection must be with the corner of the public survey.

136. Mineral Monuments in Suspended Townships.—Surveys and connections of mineral claims may be made in suspended townships in the same manner as though the claims were upon unsurveyed land, except as hereinafter specified, by connecting them with independent mineral monuments. At the same time, the position of any public-land corner which may be found in the neighborhood of the claim should be noted, so that, in case of the release of the township from suspension, the position of the claim can be shown on the plat.

137. No Choice of Tie.—A mineral survey must not be returned with its connection made only with a corner of the public survey, where the survey of the township within which it is situated is under suspension, nor connected with a mineral monument alone, when situated within the limits of a township the regularity and correctness of the survey of which is unquestioned.

138. Corner No. 1—Section Lines.—In making an official survey, corner No. 1 of each location must be established at the corner nearest the corner of the public survey or location monument, unless good cause is shown for its being placed otherwise. If connections are given to both a corner of the public survey and location monument, corners Nos. 1 should be placed at the corner nearest the corner of the public survey. When a boundary line of a claim intersects a section line courses and distances from point of intersection to the Government corners at each end of the half mile of section line so intersected must be given.

139. Erection of Mineral Monuments.—In case a survey is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, a mineral monument must be established, in the location of which the greatest care must be exercised to insure permanency as to site and construction.

140. The site, when practicable, should be some prominent point, visible for a long distance from every direction, and should be so chosen that the permanency of the monument will not be endangered by snow, rock, or landslides, or other natural causes.

141. Dimensions and Marking.—The monument should consist of a stone not less than 30 inches long, 20 inches wide, and 6 inches thick, set halfway in the ground, with a conical mound of stone 4 feet high and 6 feet base alongside. The letters U. S. L. M., followed by the consecutive number of the monument in the district, must be plainly chiseled upon the stone. If impracticable to obtain a stone of required dimensions, then a post 8 feet long, 6 inches square, set 3 feet in the ground, scribed as for a stone monument, protected by a well-built conical mound of stone of not less than 3 feet high and 6 feet base around it, may be used. The exact point for connection must be indicated on the monument by an × chiseled thereon; if a post is used, then a tack must be driven into the post to indicate the point.

142. Ties to Mineral Monument.—From the monument, connections by course and distance must be taken to two or three bearing trees or rocks, and to any well-known and permanent objects in the vicinity, such as the confluence of streams, prominent rocks, buildings, shafts, or mouths of adits. Bearing trees must be properly scribed B. T. and bearing rocks chiseled B. R., together with the number of the location monument; the exact point on the tree or stone to which the connection is taken should be indicated by a cross or other unmistakable mark. Bearings should also be taken to prominent mountain peaks, and the approximate distance and direction ascertained from the nearest town or mining camp. A detailed description of the locating monument, with a topographical map of its location, should be furnished the office of the surveyor-general by the surveyor.

143. Corners may consist of—

First.—A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone 1½ feet high, 2 feet base, alongside.

Second.—A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third.—A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

144. Marking Corners.—All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The *exact* corner point must be permanently indicated on the corner. When a rock in place is used its dimensions above ground must be stated and a cross chiseled at the exact corner point.

145. In case the point for the corner be inaccessible or unsuitable a witness corner, which must be marked with the

letters W. C. in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey, and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes, and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

146. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other objects, as prescribed in the establishment of location monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

147. Tying to Official Survey.—If an official mineral survey has been made in the vicinity, within a reasonable distance, a further connecting line should be run to some corner thereof; and in like manner all conflicting surveys and locations should be so connected, and the corner with which connection is made in each case described. Such connections will be made and conflicts shown according to the boundaries of the neighboring or conflicting claims as each is marked, defined, and actually established upon the ground. The mineral surveyor will fully and specifically state in his return *how* and by what *visible evidences* he was able to identify on the ground the several conflicting surveys and those which appear according to their returned tie or boundary lines to conflict, if they were so identified, and report errors or discrepancies found by him in any such surveys. In the survey of contiguous claims which constitute a consolidated group, where corners are common, bearings should be mentioned but once.

148. Topography.—The mineral surveyor should note carefully all topographical features of the claim, taking distances on his lines to intersections with all streams, gulches, ditches, ravines, mountain ridges, roads, trails, etc., with their widths, courses, and other data that may be required to map them correctly. All municipal or private improvements, such as blocks, streets, and buildings, should be located.

149. Conflict With Other Surveys.—If, in running the exterior lines of a claim, the survey is found to conflict with the survey of another claim, the distances to the points of intersection, and the courses and distances along the line intersected from an established corner of such conflicting claim to such points of intersection, should be described in the field notes: *Provided*, That where a corner of the conflicting survey falls within the claim being surveyed, such corner should be selected from which to give the bearing, otherwise the corner nearest the intersection should be taken. The same rule should govern in the survey of claims embracing two or more locations the lines of which intersect.

150. A lode and mill-site claim in one survey will be distinguished by the letters A and B following the number of the survey. The corners of the mill site will be numbered independently of those of the lode. Corner No. 1 of the mill site must be connected with a corner of the lode claim as well as with a corner of the public survey or United States location monument.

151. When a placer claim includes lodes, or when several contiguous placer or lode locations are included as one claim in one survey, there must be given to the corners of each location constituting the same a separate consecutive numerical designation, beginning with corner No. 1 in each case.

152. Conflicting Surveys Named.—Throughout the description of the survey, after each reference to the lines or corners of a location, the name thereof must be given, and if unsurveyed, the fact stated. If reference is made to a location included in a prior official survey, the survey number must be given, followed by the name of the location. Corners should be described once only.

153. The total area of each location and also the area in conflict with each intersecting survey or claim should be stated; also the total area claimed. But when locations embraced in one survey conflict with each other such conflicts should only be stated in connection with the location from which the conflicting area is excluded.

154. Section, Township and Range to Be Shown.—It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

155. The title-page of the field notes must contain the post-office address of the claimant or his authorized agent.

156. In the mineral surveyor's report of the value of the improvements all *actual* expenditures and *mining* improvements made by the claimant or his grantors, having a direct relation to the development of the claim, must be included in the estimate.

157. What Improvements Excluded.—The expenditures required may be made from the surface or in running a tunnel, drifts, or crosscuts for the development of the claim. Improvements of any other character, such as buildings, machinery, or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of, and actually facilitate the extraction of mineral from, the claim.

158. Ties—Abandoned Improvements.—All mining and other improvements claimed will be located by courses and distances from corners of the survey, or from points on the center or side lines, specifying with particularity and detail the dimensions and character of each, and the improvements upon each location should be numbered consecutively, the

point of discovery being always No. 1. Improvements made by a former locator who has abandoned the claim, can not be included in the estimate, but should be described and located in the notes and plat.

159. In case of a lode and mill-site claim in the same survey the expenditure of five hundred dollars must be shown upon the lode claim.

160. Expenditure During Publication.—If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey, the mineral surveyor may file with the surveyor-general supplemental proof showing five hundred dollars expenditure made prior to the expiration of the period of publication.

161. Preliminary Plat.—The mineral surveyor will return with his field notes a preliminary plat on blank sent to him for that purpose, protracted on a scale of two hundred feet to an inch, if practicable. In preparing plats the top is north. Copy of the calculations of areas by double meridian distances and of all triangulations or traverse lines must be furnished. The lines of the claim surveyed should be heavier than the lines of conflicting claims.

162. Errors—Joint Survey.—Whenever a survey has been reported in error the surveyor who made it will be required to promptly make a thorough examination upon the premises and report the result, under oath, to the surveyor-general's office. In case he finds his survey in error he will report in detail all discrepancies with the original survey and submit any explanation he may have to offer as to the cause. If, on the contrary, he should report his survey correct, a joint survey will be ordered to settle the differences with the surveyor who reported the error. A joint survey must be made within ten days after the date of order unless satisfactory reasons are submitted, under oath, for a postponement. The field work must in every sense of the term be a *joint* and not a separate survey, and the observations and measurements taken with the same instrument and chain, previously tested and agreed upon.

163. The mineral surveyor found in error, or, if both are in error, the one who reported the same, will make out the field notes of the joint survey, which, after being duly signed and sworn to by both parties, must be transmitted to the surveyor-general's office.

164. Inasmuch as amended surveys are ordered only by special instructions from the General Land Office, and the conditions and circumstances peculiar to each separate case, and the object sought by the required amendment, alone govern all special matters relative to the manner of making such survey and the form and subject-matter to be embraced in the field notes thereof, but few general rules applicable to all cases can be laid down.

165. The amended survey must be made in strict conformity with, or be embraced within, the lines of the original survey. If the amended and original surveys are identical, that fact must be clearly and distinctly stated in the field

notes. If not identical, a bearing and distance must be given from each established corner of the amended survey to the corresponding corner of the original survey. The lines of the original survey, as found upon the ground, must be laid down upon the preliminary plat in such manner as to contrast and show their relation to the lines of the amended survey.

166. The field notes of the amended survey must be prepared on the same size and form of blanks as are the field notes of the original survey, and the word "amended" must be used before the word "survey" wherever it occurs in the field notes.

167. Descriptive Report on Placers.—Mineral surveyors are required to make full examinations of all placer claims at the time of survey and file with the field notes a descriptive report, in which will be described—

(a) The quality and composition of the soil, and the kind and amount of timber and other vegetation.

(b) The locus and size of streams, and such other matter as may appear upon the surface of the claims.

(c) The character and extent of all surface and underground workings, whether placer or lode, for mining purposes, locating and describing them.

(d) The proximity of centers of trade or residence.

(e) The proximity of well-known systems of lode deposits or of individual lodes.

(f) The use or adaptability of the claim for placer mining, and whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose.

(g) What works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(h) The true situation of all mines, salt licks, salt springs, and mill sites which come to the surveyor's knowledge, or a report by him that none exist on the claim, as the facts may warrant.

(i) Said report must be made under oath and duly corroborated by one or more disinterested persons.

168. The employing of claimants, their attorneys, or parties in interest, as assistants in making surveys of mineral claims, will not be allowed.

169. Accuracy Required—Threat of Revocation.—The field work must be accurately and properly performed and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability for the faithful discharge of his duties, and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If found incompetent as a sur-

veyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

R. A. BALLINGER,
Commissioner.

Approved, May 21, 1907.
JAMES RUDOLPH GARFIELD, *Secretary.*

*CIRCULAR TO APPLICANTS.

To Applicants for Mineral Survey Orders:

You will observe the following requirements in the conduct of your business with the Surveyor General's Office, the same being based upon the United States mining laws and circular and special instructions from the Commissioner of the General Land Office:

1. All applications for survey orders, descriptive reports on placer claims, or certificates of five hundred dollars expenditure, should be addressed to the Surveyor General and be signed by the claimants, their agent or attorney.

2. Each application should contain:

(a) The name of the claimant in full, and as it is desired to appear in the application for patent.

(b) The name of each location embraced in the claim.

(c) The name of the land and mining districts in which the claim is located.

(d) The name of the United States mineral surveyor to whom it is desired the order shall be issued.

3. You are required to file with each application for survey order, a copy of the record of location of the claim, properly certified by the recorder of the county or mining district where the claim is situate.

4. The mineral surveyor is required to survey the claim in *strict conformity* with or *within* the lines of the location upon which the order of survey is based. You are, therefore, advised before filing your application to see that your location has been made in compliance with the law and regulations, and that it properly describes the claim for which the patent is sought.

The act of Congress of May 10, 1872, expressly provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," and "that all records of mining claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim."

*NOTE.—This circular was part of the Manual of Instructions issued in 1895, and is unaffected by subsequent Revisions of Land Office Regulations.

"These provisions of the law must be strictly complied with in each case to entitle a claimant to a survey and patent, and therefore should a claimant under a location made *subsequent* to the passage of the mining act of May 10, 1872, who has not complied with said requirements in regard to marking the location upon the ground, and recording the same, apply for a survey, you will decline to make it."

"The only relief for a party under such circumstances, will be to make a new location in conformity to law and regulations, as no case will be approved by this office, unless these and all other provisions of law are substantially complied with." (See General Land Office circular dated November 20, 1873.)

5. Par. 99 *(now 91)*, General Land Office circular, of December 10, 1891, edition December 1, 1894, relating to the expense of office work connected with the survey of mineral claims, reads as follows:

"With regard to the *platting* of the claim and other *office work* in the Surveyor General's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer, or designated depository, in favor of the United States treasurer, to be passed to the credit of the fund created by 'individual depositors for surveys of the public lands,' and file with the Surveyor General duplicate certificates of such deposits in the usual manner." (See Rule 91, p. 400.)

6. The various Surveyors General have adopted schedules of rates for office work, and an estimate of the cost in any particular case may be had upon application.

Should an applicant deem an estimate excessive, he will be allowed the right of appeal to the General Land Office in the usual manner.

In transmitting such an appeal the Surveyor General should transmit therewith a full report.

7. Should the office work in any case amount to more than the estimate, or if an amended order is issued, an additional deposit will be required.

8. In districts where there are no United States depositories, you should deposit with the nearest assistant United States treasurer, or depository, and in all cases immediately forward the original certificate to the Secretary of the Treasury and the duplicate to the Surveyor General's Office, retaining the triplicate for your own use and security. Under no circumstances will the deposit be made by the Surveyor General. (See paragraph 5, preceding.)

9. An application for an amended survey order must be accompanied with a statement setting forth fully the reasons for the proposed amendment and all the material facts in the matter.

10. If, after having obtained a survey order, you should abandon your purpose of having a survey made, you can apply the deposit, less the amount estimated for office expenses already incurred, on a new survey if one is desired.

11. Upon discovery of any error or defect in an order you are requested to return it to the Surveyor General's Office for correction or amendment.

12. If, after having obtained an order for survey, you should find that the record of location does not practically describe the location as staked upon the ground, you should file a certified copy of an amended location certificate, correctly describing the claim, and obtain an *amended order* for survey. If a relocation of the claim is made embracing ground not included in the original order, or other material change is made, you will abandon the original number of the order for survey, and a new order will be issued in which a number in the current series will be substituted.

13. The order of approval of surveys of mineral claims is prescribed by General Land Office circular dated March 3, 1881, as follows:

"The mining survey first applied for shall have the priority of action in all its stages in the office of the Surveyor General, including the delivery thereof, over any other survey of the same ground or any portion thereof.

"The Surveyor General should not order or authorize a survey of a claim which conflicts with one previously applied for until the survey first applied for has been completed, examined, approved and platted, and the plats delivered.

"When the conflict does not appear until the field notes of the respective surveys are returned, then the survey first applied for should be first examined, approved, and platted, and the plats delivered before the field notes of the survey last applied for are taken up for examination or plats constructed.

"When the survey first authorized is not returned within a reasonable period, and the applicant for a conflicting survey makes affidavit that he believes (stating the reasons for his belief) that such first applicant has abandoned his purpose of having a survey made, or is deferring it for vexatious purposes, to wit, to postpone the subsequent applicant, the Surveyor General shall give notice of such charges to such first applicant, and call upon him for an explanation under oath of the delay. He shall also require the mineral surveyor to make a full statement in writing, explanatory of the delay; and if the Surveyor General shall conclude that good and sufficient reasons for such delay do not exist, he shall authorize the applicant for the conflicting survey to proceed with the same; otherwise the order of proceedings shall not be changed.

"Whenever an applicant for a survey shall have reason to suppose that a conflicting claimant will also apply for a survey for patent, he may give a notice in writing to the Surveyor General particularly describing such conflicting claim, and file a copy of the notice of location of such conflicting claim. In such case the Surveyor General will not order or authorize any survey of such conflicting claim until the survey first applied for has been examined, completed, approved and platted, and the plats delivered."

14. You have the option of employing any United States mineral surveyor in the district to execute the order of survey, and must make satisfactory arrangements with such surveyor for the payment of his services and those of his assistants in making the survey, as the United States will not be held responsible for the payment of the same. The duty of the mineral surveyor in any particular case ceases when he has executed the survey and returned the same to this office. He is not allowed to prepare for the mining claimant the papers in support of an application for patent, being precluded from acting either directly or indirectly as attorney in mineral claims. (Sec. 2334.)

15. You are advised of your right to appeal to the Commissioner of the General Land Office from the approval or disapproval of the survey of your claim. The appeal must be in writing or in print, should set forth in brief and clear terms the specific points of exception to the ruling appealed from and should be transmitted through the Surveyor General's Office.

SURVEYOR GENERAL'S CIRCULAR.

The following circular relating to expense of office work in the Surveyor General's Office in Colorado, dated June 21, 1902, is still in force.

In accordance with paragraph 91, General Land Office Circular of the United States Mining Laws, approved July 26, 1901, relating to the expense of office work connected with the survey of mineral claims, which authorizes the Surveyor General in each district to require a deposit for platting and other office work for mineral surveys; it is directed, the same having been approved June 18, 1902, by the General Land Office, that on and after July 1, 1902, the estimated cost of platting and other office work in connection with the survey of mineral claims, be computed as follows:

Charges in Surveyor General's Office.

For lode claim.	$30.00
For placer claim.	35.00
For mill-site.	30.00
For mill-site included in one survey with a lode claim.	20.00
For each lode claim within and included in the survey of a placer claim. . . .	20.00
For several lode locations included in one survey, the first location named.	30.00
All other locations included, each. . . .	25.00
For several placer locations included in one survey, the first location named.	35.00
All other locations included, each. . . .	30.00
For affidavit of $500 expenditure of improvements, after approval of survey.	5.00

Should an amended order issue, an additional deposit will be required.

W. G. LEWIS, Surveyor General.

*APPLICATION FOR PATENT.

The following pages are intended to contain the forms of application and proceedings to obtain patent, in the order of time in which the several papers should be made and filed.

*For many valuable suggestions upon points covered by this book, especially in this chapter, we are under obligations to *E. E. Chase*, U. S. Mineral Surveyor, Denver, and *Milton E. Blake*, Chief of Mineral Division in the Surveyor General's office; upon geological points to *Kirby Thomas* and *Franklin R. Carpenter*, Ph. D.

Request for Official Survey.

A citizen of the United States, or one who has declared his intention to become such, or a corporation chartered within the United States, being the holder of the possessory title to a lode claim, causes application for an official survey to be made by an

**A. APPLICATION FOR ORDER FOR SURVEY.

DENVER, November 1, 1907.

To the U. S. Surveyor General, District of Colorado, Denver:

SIR:—You are requested to issue an order for an official survey of the mining claim of *C. A. Wolcott*, upon the *Bear lode*, located in *Cripple Creek* mining district, *Teller* county, *Pueblo* land district, Colorado.

I herewith transmit certified copy of the location certificate of said claim, and have deposited for office fees* on same $30 to the credit of the treasurer of the United States at the *First* National Bank (U. S. Depository) with request that duplicate certificate be forwarded to you.

Send order to *E. E. Chase*, U. S. Min. Sur., at *Denver*, Colorado. Yours respectfully,

C. A. WOLCOTT,
Claimant.

By *Emilio D. DeSoto, Attorney.*

Postoffice address (of Claimant) *Boulder, Colorado.*
Postoffice address (of attorney) *50½ Equitable Bldg., Denver.*

The payment mentioned in the application is not by draft to the Surveyor General but by a deposit in a bank recognized as a United States Depository. Upon payment to such bank the claimant receives triplicate certificates of deposit, of which he mails the *Original* to the secretary of the treasury at Washington, the *Duplicate* he mails with the letter (A) to the Surveyor General (or the bank forwards it) and the *Triplicate* he retains.

This certificate is a mere receipt for money and has no farther value, except where the application is withdrawn, in which case the unexpended balance will be allowed to apply on another survey.

**The forms for placer and mill site applications are substantially the same.

*For costs in Surveyor General's office, *see p. 418.*

In reply to the application (A) the Surveyor General mails to the U. S. deputy mineral surveyor designated therein the

B. ORDER FOR SURVEY.

DEPARTMENT OF THE INTERIOR,
OFFICE OF U. S. SURVEYOR GENERAL,
DENVER, COLO., November 3, 1907.

E. E. Chase, U. S. Mineral Surveyor for the District of Colorado.

SIR:—You are hereby directed to survey the claim of *C. A. Wolcott,* upon the *Bear* lode, in *Cripple Creek* mining district, *Teller* County, Colorado. This survey will be designated "Survey No. 11,310 *Pueblo* land district," and must be made in strict conformity with the location certificate (*or amended location certificate*) dated *July 28, 1902.*

W. G. LEWIS,
U. S. Surveyor General for Colorado.

With the order B is enclosed a copy of the location certificate made in the Surveyor General's office from the certified copy filed by applicant.

The numbers of the survey lots were formerly consecutive in each mineral district, but since the abolition of mineral districts they are consecutive throughout the State, beginning with No. 4,501, with which number the new series was commenced November 30, 1886.

Survey to Conform to the Record.

This order of survey "B" being received by the U. S. mineral surveyor designated in "A," he must proceed in person to the premises, make an actual survey, and mark each post with the number of the survey and the number of the corner.

The copy of location certificate mentioned as inclosed in "A" must be certified by the recorder.

The surveyor, in making his official survey, must follow the lines as staked upon the ground.

Changing Lines After Order Received.

The Surveyor General will not allow a serious departure from the lines called for in the location certificate, without insisting upon the filing of an

amended or relocation certificate in the office of the recorder of the proper county, and the deposit of a certified copy of such amended record in the Surveyor General's office, and when such certified copy has been filed an amended order of survey issues, in which, *if any new ground has been acquired, the original number of the survey is abandoned and a new number in the current series substituted.* An additional fee of $5 is charged for the amended order, besides the cost of additional labor, if any, imposed on the Surveyor General's office.

Amending Record After Order Received.

If the certificate be indefinite, or if the end lines are not parallel, or if not properly tied, or if the certificate be without date or otherwise irregular, it will be returned for amendment. Care in the first instance will obviate delays on such grounds.

For form of amended location certificate see page 129.

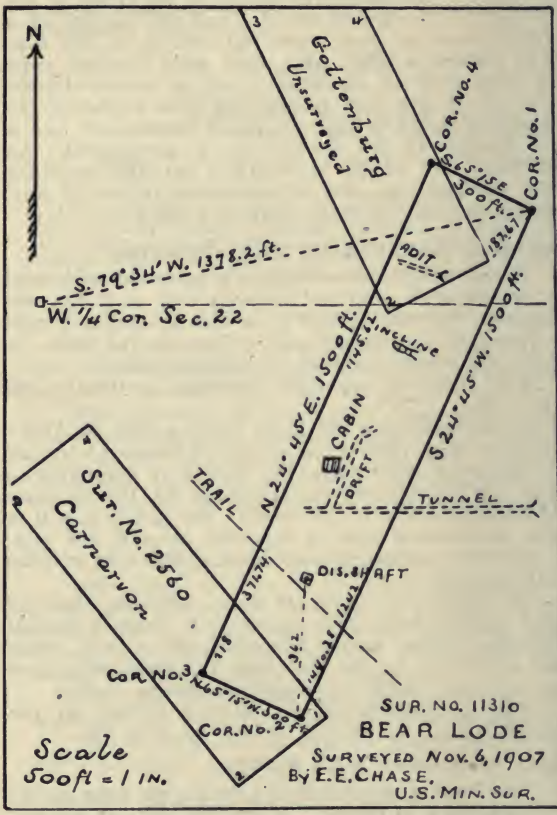
In surveys upon old lodes (before May 10, 1872) whose location certificates were not supposed to call for course or monument, the deputy is presumed to make his official survey according to the location and original claim of the locator, but practically it is made wherever it may be supposed to cover the vein, or wherever vacant ground can be found to include in the survey.

In almost all cases of early location (and in many recent ones) it is advisable to make a formal relocation before asking for order for survey. This may save time in the Surveyor General's office and prevent fatal results in resisting adverse claims.

For instructions as to making survey on the ground, see LAND OFFICE RULES, pp. 389, 405.

Delay to Proceed With Survey.

The first applicant has priority as long as he proceeds with diligence. When he fails to perfect, to the injury of a party desiring to proceed, the steps to be taken by the latter are indicated in Sec. 13 of the Circular, p. 416.



SURVEY NO. 11310. *PUEBLO* LAND DISTRICT.

The survey being complete the surveyor makes and forwards to the Surveyor General a diagram of the lode, giving its corners, courses, distances, ties, conflicts, adjoiners and improvements, which is known as

C. THE PRELIMINARY PLAT.

The plat made by the surveyor was formerly treated as the official plat of the claim, from which the connected plat of all claims kept by the Surveyor General was made, but under present practice the surveyor's plat is only treated as a correction to the field notes, all official plats now being made in the office of the Surveyor General.

Along with this diagram or preliminary plat "C," the surveyor forwards to the Surveyor General his

D. FIELD NOTES,

the following form being arranged to illustrate the more ordinary complications:

Survey No. 11,310. *Pueblo* Land District.

FIELD NOTES

Of the survey of the claim of *C. A. Wolcott*, known as the *Bear* lode, in *Cripple Creek* mining district, *Teller* County, Colorado.

Section 22, Township 15 South, Range 69 West.

Surveyed under instructions dated *November 3, 1907*, by *E. E. Chase*, U. S. Mineral Surveyor.

Survey began *November 6, 1907*, and completed *November 6, 1907*.

Address of claimant: C. A. WOLCOTT, Boulder, Colorado.

SURVEY NO. 11310.—BEAR LODE.

FEET.

Beginning at Cor. No. 1.

Identical with Cor. No. 1 of the location.

A spruce post, 5 ft. long, 4 ins. square, set 2 ft. in the ground, with mound of stone, marked 1-11310 whence

The W. ¼ cor. Sec. 22, T. 15 S. R. 69 W. of the 6th Principal Meridian, bears S. 79° 34′ W. 1378.2 ft.

Cor. No. 1, Gottenburg lode (unsurveyed), Neals Mattson, claimant, bears S. 40° 29′ W. 187.67 ft.

A pine 12 ins. dia. blazed and marked B. T. 1-11310 bears S. 7° 25′ E. 22 ft.

Mt. Pisgah bears S. 80° 15′ W.

Bull Hill bears N. 80° W.
Thence S. 24° 45′ W.
Va. 15° 12′ E.

1242. To trail, course N. W. and S. E.

1440.28 Intersect line 1-4, Sur. No. 2560, at N. 38° 52′ W. 76.6 ft. from Cor. No. 1.

1500. To Cor. No. 2. Identical with Cor. No. 2 of the location.

A granite stone 25x9x6 ins. set 18 ins. in the ground chiseled 2-11310, whence
Cor. No. 1, Sur. No. 2560, Carnarvon lode, David Davis, *et al.*, claimants, bears N. 88° E. 61.6 ft.
North end of bridge over Grassy gulch bears N. 65° 15′ W. 1250 ft.
Thence N. 65° 15′ W.
Va. 15° 20′ E.

300. To Cor. No. 3. Identical with Cor. No. 3 of location.

A cross at corner point, and 3-11310 chiseled on a granite rock in place, 20x14x6 ft. above the general level, whence
Cor. No. 2, Sur. No. 2560 bears S. 72° 45′ E. 325 ft.
A spruce 16 ins. dia. blazed and marked B. T. 3-11310 bears S. 58° W. 18 ft.
Thence N. 24° 45′ E.
Va. 15° 20′ E.

218. Intersect line 4-1, Sur. No. 2560 at N. 38° 52′ W. 396.4 ft. from Cor. No. 1.

371.74 To trail, course N. W. and S. E.

1145.62 Intersect line 2-3, Gottenburg lode, at N. 25° 56′ W. 76.26 ft. from Cor. No. 2.

1500. To Cor. No. 4. Identical with Cor. No. 4 of the location.

A pine post 4.5 ft. long, 5 ins. square, set one foot in the ground, with mound of earth and stone, marked 4-11310 whence
A cross chiseled on rock in place, marked B. R. 4-11310 bears N. 28° 10′ E. 58.9 ft.
Thence S. 65° 15′ E.
Va. 15° 12′ E.

28.5 Intersect line 4-1, Gottenburg lode, at N. 25° 56′ W. 285.13 ft. from Cor. No. 1.

300 To Cor. No. 1, the place of beginning.*

The identity of the claims conflicting with the Bear Lode as herein described, was determined by finding corners 1, 2 and 3 of Survey No. 2560, and corners 1 and 2 of the Gottenburg lode upon the ground.

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*Adjoining claimants are mentioned as they are reached in the notes, as they ambit the claim.—*Rule 149*

Area.

Total area of *Bear* lode.....		10.33 acres
Less area in conflict with		
Sur. No. 2560.....	.956 acre	
Gottenburg lode.....	1.363 acre	2.319 acres
Net area *Bear* lode claimed.....		8.011 acres

Location.

This claim is located in the W. ½ Sec. 22, T. 15 S. R. 69 W.

Expenditure of Five Hundred Dollars.

I certify that the value of the labor and improvements upon this claim placed thereon by the claimant and his grantors, is not less than five hundred dollars, and that said improvements consist of

The discovery shaft of the *Bear* lode, 6x3 ft. 10 ft. deep in earth and rock, which bears from Cor. No. 2 N. 4° E. 362 ft.

Value $80.

An incline 7x5 ft. 45 ft. deep in coarse gravel and rock, timbered, course N. 58° 15′ W. dip 62°, the mouth of which bears from Cor. No. 2 N. 19° 37′ E. 1025 ft.

Value $550.

A log shaft-house 14 ft. square, over the discovery shaft.

Value $100.

Two-thirds interest in a tunnel 6.5x5 ft. running due west 835 ft., timbered, the mouth of which bears from Cor. No. 2 N. 51° 15′ E. 837 ft.

This tunnel is in course of construction for the development of the *Bear* lode and also for the Carnarvon lode, Survey No. 2560, David Davis, *et al.*, claimants, the remaining one-third interest therein having already been included in the estimate of five hundred dollars expenditure upon the latter claim.

Total value of tunnel, $13,000.

A drift 6.5x4 ft. on the Bear lode, beginning at a point in tunnel 550 ft. from the mouth, and running N. 20° 20′ E. 195 ft. thence N. 54° 15′ E. 40 ft. to breast.

Value $2,800.

Other Improvements.

A log cabin 35x28 ft., the S. W. corner of which bears from Cor. No. 3 N. 30° 44′ E. 650 ft.

Said cabin belongs to the claimant herein.

An adit 6x4 ft. running N. 70° 50′ W. 100 ft., the mouth of which bears from Cor. No. 1 S. 58° 12′ W. 323 ft., belonging to Neals Mattson, claimant of the Gottenburg lode.

Instrument.

The survey was made with a *Buff & Berger* transit with *Smith's* solar attachment. The courses were deflected from the true meridian as determined by solar observations. The distances were measured with 500 and 100 ft. steel tapes.

MEMORANDA AS TO CHAINMEN, ETC. (PART OF "D".)

A list of the names of the individuals employed by *E. E. Chase,* United States Mineral Surveyor, to assist in running, measuring, and marking the lines, corners and boundaries described in the foregoing field notes of the survey of the mining claim of *C. A. Wolcott,* known as the *Bear* lode, and showing the respective capacities in which they acted.

L. E. Lemen, Chainman.
Otto Shatz, Axman.

AFFIDAVIT OF ASSISTANTS.

STATE OF COLORADO, County of *Teller:* ss.

We, *L. E. Lemen* and *Otto Shatz,* do solemnly swear that we assisted *E. E. Chase,* United States Mineral Surveyor, in marking the corners and surveying the boundaries of the mining claim of *C. A. Wolcott,* known as the *Bear* lode, represented in the foregoing field notes as having been surveyed by said Mineral Surveyor and under his direction and that said survey has been in all respects, to the best of our knowledge and belief, faithfully and correctly executed, and the corner and boundary monuments established according to law and the instructions furnished by the United States Surveyor General for Colorado.

L. E. LEMEN, Chainman.
OTTO SHATZ, Axman.

Subscribed and sworn to by the above named persons before me this 8th day of November, 1907.

Henry H. Clark,
[SEAL.] Notary Public.

FINAL AFFIDAVIT OF U. S. MINERAL SURVEYOR.
Part of "D."

I, *Edwin E. Chase,* U. S. mineral surveyor, do solemnly swear that, in pursuance of instructions received from the United States Surveyor General for Colorado, dated November 3, 1907, I have, in strict conformity to the laws of the United States, the official regulations and instructions thereunder, and the instructions of said surveyor general, faithfully and correctly executed the survey of the mining claim of *C. A. Wolcott,* known as the *Bear* lode, situate in Cripple Creek Mining District, *Teller* County, Colorado, in Section *22, Township No. 15, S. Range No. 69 W.,* designated as Survey No. *11,310,* as represented in the foregoing field notes, which accurately show the boundaries of

said mining claim as distinctly marked by monuments on the ground, and described in the attached copy of the location certificate, which was received by me from the surveyor general with said instructions, and that all the corners of said survey have been established and perpetuated in strict accordance with the law, official regulations and instructions thereunder; and I do further solemnly swear that the foregoing are the true and original field notes of said survey and my report therein, and that the labor expended and improvements made upon said mining claim by claimant or his grantors are as therein fully stated, and that the character, extent, location and itemized value thereof are specified therein with particularity and full detail, and that no portion of said labor or improvements so credited to this claim has been included in the estimate of expenditure upon any other claim.

EDWIN E. CHASE,
U. S. Mineral Surveyor.

Subscribed and sworn to by the said *Edwin E. Chase*, U. S. mineral surveyor, before me, a notary public, this 10th day of November, 1907. *Henry H. Clark*,
[SEAL.] Notary Public.

The Preliminary Plat "C" and Field Notes "D" containing, besides what are strictly the Field Notes, also the memoranda of improvements, list of helpers, etc., with certificate and affidavit as above given, are then forwarded to the Surveyor General, who compares the plat, reviews the notes, etc., and if errors appear, as they often do, or if he can not make the connections agree with his "connected plat," they are returned for correction; but if correct, the Field Notes are endorsed as follows:

E. APPROVAL OF SURVEY.

DEPARTMENT OF THE INTERIOR.
Office of the U. S. Surveyor General.

DENVER, COLO., Dec. 11, 1907.

I, *W. G. Lewis*, U. S. Surveyor General for Colorado, do hereby certify that the foregoing and hereto attached field notes and return of the survey of the mining claim of *C. A. Wolcott*, known as the *Bear* lode, situated in *Cripple Creek* Mining District, *Teller* County, Colorado, in *Section 22, Township No. 15 S., Range No. 69 W.* designated as Survey No. 11310, executed by *E. E. Chase*, U. S. mineral surveyor, *November 6, 1907*, under my instructions dated *November 3, 1907*, have been critically examined and the necessary corrections and explanations made, and the said field notes and return, and the survey they describe are

hereby approved. A true copy of the copy* of the location certificate filed by the applicant for survey is included in the field notes.

W. G. LEWIS,
U. S. Surveyor General for Colorado.

The field notes "D" endorsed with the official approval "E" are then bound and kept permanently for reference in the Surveyor General's office after he has caused to be made from them

F. THE FINAL PLAT

of which the original is retained in the Surveyor General's office, one copy is forwarded by the Surveyor General to the proper local land office and two copies are forwarded to the mineral surveyor.

The original and each copy of the final plat "F" is certified by endorsement thereon, as follows:

G. SURVEYOR GENERAL'S APPROVAL OF SURVEY AND CERTIFICATE OF $500 IMPROVEMENTS.

Date of (amended) location, *July 28, 1902.* Mineral Survey No. 11310, *Pueblo* land district.

Plat of the claim of *C. A. Wolcott*, known as the *Bear* lode, *Cripple Creek* mining district, *Teller* County, Colorado, containing an area of 8.011 acres. Scale of 200 feet to the inch. Variation 15° 20′ east. Surveyed by *E. E. Chase*, U. S. Mineral Surveyor, *Nov. 6, 1907.*

The original field notes of the survey of the mining claim of *C. A. Wolcott*, known as the *Bear* lode, from which this plat has been made under my direction, have been examined and approved, and are on file in this office, and I hereby certify that they furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof. I further certify that five hundred dollars' worth of labor has been expended or improvements made upon said mining claim by *claimant* or his grantors and that said improvements consist of *the discovery shaft, an incline, a shaft house, an interest in a tunnel, and a drift*, as appears by the affidavit of the mineral surveyor; that the location of said improvements is correctly shown upon this plat, and that no portion of said labor or improvements has been included in the estimate of expenditures upon any other claim.

*This is the copy mailed to the surveyor with the order B, and has now been returned attached to the field notes.

And I further certify that this is a correct plat of said mining claim made in conformity with said original field notes of the survey thereof, and the same is hereby approved.

W. G. LEWIS,
U. S. Surveyor General for Colorado.

U. S. Surveyor General's Office, Denver, Colorado.
Dec. 11, 1907.

When the improvements are completed, pending publication, the Surveyor General makes a separate certificate.—*See p. 464.*

The amount of improvements is to be found by the Surveyor General or his deputy, or from the testimony of witnesses.—*U. S. v. King, 83 F. 188.* *See L. O. Reg. 49.*

Along with two copies of the diagram "F," with its endorsement "G" the Surveyor General forwards to the surveyor for claimant the

H. TRANSCRIPT OF FIELD NOTES, otherwise called

"APPROVED FIELD NOTES."

This instrument "H" is verbatim the same as "D," including all its exhibits, but not the Surveyor General's certificate "G." Instead of the certificate "G" such transcript is certified as follows:

I. SURVEYOR GENERAL'S CERTIFICATE TO TRANSCRIPT "H."

DEPARTMENT OF THE INTERIOR.
Office of the U. S. Surveyor General.

Denver, Colorado, *Dec. 11, 1907.*

I, *W. G. Lewis*, U. S. Surveyor General for Colorado, do hereby certify that the foregoing transcript of the field notes, return and approval of the survey of the mining claim of *C. A. Wolcott*, known as the *Bear* lode, situate in *Cripple Creek* mining district, *Teller* County, Colorado, in *Section 22, Township No. 15, S. Range No. 69 west 6th P. M.* has been correctly copied from the originals on file in this office; that said field notes furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof.

And I further certify that five hundred dollars' worth of labor has been expended or improvements made upon said mining claim by claimant or his grantors, and that said improvements consist of the discovery shaft, an

incline, a shaft house, an interest in a tunnel, and a drift, and that no portion of said labor or improvements has been included in the estimate of expenditures upon any other claim.

I further certify that the plat thereof, filed in the U. S. land office at *Pueblo*, is correct and in conformity with the foregoing field notes.

W. G. LEWIS.
United States Surveyor General for Colorado.

These matters are all preliminary to the application for patent *proper* which is made to the local land office, these proceedings in the Surveyor General's office being necessary because each lode claim must be separately surveyed, whereas in case of agricultural land a party simply enters upon a particular quarter section which has been already surveyed and platted.

Delivery of Papers to the Attorney.

The above transcript "H" received from the Surveyor General which is generally termed the "Approved Field Notes," the surveyor then delivers, along with the plats or diagrams received from the same office, to the attorney for the claimant, who is supposed to supervise the signing and filing of all the subsequent papers, and takes charge of the application from this point, although in fact the further papers and the superintendence of the posting, etc., are frequently left in charge of the Surveyor.

Respective Duties of Surveyor and Attorney.

The U. S. Mineral surveyors are not allowed to act as attorneys.—*Rule 128.* The surveyor's services seem properly to end with the preparation of papers for the Surveyor General's office and the reception of papers from that office. These latter he turns over to the attorney, who makes out or supervises all papers intended for the land office. The surveyor's aid should not, however, be discarded pending the application, as with many of the forms he is more familiar than attorneys generally are. The profession ought not to object to surveyors filling out the ordinary blanks, especially in cases where no adverse

claim is expected, nor to their attending to posting, publication, proofs of citizenship, etc., if they will not attempt to make out the location and relocation certificates—which are strictly legal papers—the interference of the surveyors in these matters generally leaving applicants in a position where they seriously need an attorney's advice, if not already too late to be of service. And in case of land office contest any interference by the surveyor would be officious and reprehensible.

The claimant or his attorney then prepares four copies of "K:" one for posting on the claim, one to be attached to proof of posting, one for publication in newspaper and one for posting in Land Office.

K. NOTICE OF APPLICATION FOR U. S. PATENT.

Survey No. 11310.

U. S. LAND OFFICE, *Pueblo*, December 15, 1907.

Notice is hereby given that in pursuance of the Act of Congress approved May 10, 1872, *C. A. Wolcott*, whose postoffice is *Boulder*, Colorado, has made application for a patent for 1500 linear feet on the *Bear* lode, bearing gold and silver, the same being 365 feet southwesterly and 1135 feet northeasterly from discovery shaft thereon, with surface ground 300 feet in width, situate in *Cripple Creek* mining district, *Teller* County, State of Colorado, and described by the official plat and by the field notes on file in the office of the register of *Pueblo* land district, Colorado, as follows, viz.:

Beginning at corner No. 1, whence the W. ¼ cor. Sec. 22, T. 15 S. R. 69 W. of the 6th Principal Meridian, bears S. 79° 34′ W. 1378.2 feet.

Cor. No. 1, Gottenburg lode (unsurveyed) Neals Mattson, claimant, bears S. 40° 29′ W. 187.67 ft.

Thence S. 24° 45′ W. 1500 ft. to cor. No. 2, whence cor. No. 1, sur. No. 2560, Carnarvon lode, bears N. 88° E. 61.6 ft. Thence N. 65° 15′ W. 300 ft. to cor. No. 3. Thence N. 24° 45′ E. 1500 ft. to cor. No. 4. Thence S. 65° 15′ E. 300 ft. to cor. No. 1, the place of beginning; containing 8.011 acres (exclusive of survey No. 2560 and the Gottenburg lode), and forming a portion of the west ½ section 22, in township 15 S. Range 69 W. of the Sixth Principal Meridian. The names of the adjoining and conflicting claims as shown by the plat of survey are the Gottenburg lode on the northwest and the Carnarvon lode on the south.

Witness: C. A. WOLCOTT.
John C. Clark.
B. F. Pinson.

Naming Adjoining Claims.

The Regulations (*Rule 39*) require the notice to give "the names of adjoining and conflicting claims as shown by the Plat of Survey"—*29 L. D. 250*—and by *Rules 38* and *149*, all conflicts with surveyed claims, and with unsurveyed claims intended to be excluded, are required to be shown in the field notes.

One of the notices "K" should be at once posted on the claim, along with one of the certified diagrams received from the Surveyor General, the two papers being loosely attached, or, as more usual, placed side by side, in some conspicuous place on the claim (usually at the discovery shaft) in presence of two persons who attach their signatures as shown upon form "K."

Another of the notices "K" is attached to

L. PROOF OF POSTING NOTICE AND DIAGRAM ON THE CLAIM.

STATE OF COLORADO, *Teller* County: ss.

John C. Clark and *B. F. Pinson*, each for himself, and not one for the other, being first duly sworn according to law, deposes and says, that he is a citizen of the United States, over the age of twenty-one years, and was present on the *15th* day of *December*, A. D. *1907*, when a plat representing the claim of *C. A. Wolcott*, and certified as correct by the United States Surveyor General of Colorado, and designated by him as lot No. 11,310 together with a notice of the intention of said *C. A. Wolcott* to apply for a patent for the mining claim and premises so platted was posted in a conspicuous place upon said mining claim, to wit: upon the outside of the door of the shaft house at the discovery, where the same could be easily seen and examined. A copy of the notice so posted upon said claim is herewith attached and made a part of this affidavit.

JOHN C. CLARK.
B. F. PINSON.

Subscribed and sworn to before me this *15th* day of *December*, A. D. *1907*, and I hereby certify that I consider the above deponents credible and reliable witnesses, and that the foregoing affidavit and notice were read by each of them before their signatures were affixed thereto, and the oath made by them.

[SEAL.] *Henry Moody*, Notary Public.

The form "L" is subscribed by at least two posting witnesses. The applicant does not sign it, and should not be one of the two witnesses.

The third notice "K," signed by the applicant, but not by the witnesses, goes with the second of the plats received from the Surveyor General (*page 427*), when it is sent with the first set of papers to the land office, where the register attaches his attesting signature, and it will remain posted in the land office, while its fellow notice and plat are standing on the claim during the period of publication.

The next paper to be prepared is the

M. APPLICATION FOR PATENT.

STATE OF COLORADO, *Teller* County: ss.

Application for patent for the *Bear* Lode Mining Claim. To the Register and Receiver of the U. S. Land Office at *Pueblo*, Colorado:

C. A. Wolcott, whose postoffice address is *Boulder, Colorado*, being duly sworn, according to law, deposes and says: that in virtue of a compliance with the mining rules, regulations and customs, by himself (and his grantors) he, the applicant for patent herein, has become the owner of and is in the actual, quiet and undisturbed possession of 1500 linear feet of the *Bear* vein, lode or deposit, bearing gold and silver, together with surface ground 300 feet in width, for the convenient working thereof as allowed by local rules and customs of miners, said mineral claim, vein, lode or deposit and surface ground being situate in *Cripple Creek* mining district, County of *Teller*, and State of Colorado, as more particularly set forth and described in the official field notes of survey thereof, hereto attached, dated December 11, 1907, and in the official plat of said survey, now posted conspicuously upon said mining claim or premises, a copy of which is filed herewith. Deponent further states that the facts relative to the right of possession of himself to said mining claim, vein, lode, or deposit and surface ground so surveyed and platted, are substantially as follows, to wit: The *Bear* lode was discovered on or about the *fourth day of July*, A. D. 1897, by *James A. McFadden*, who afterwards, and before the *twenty-eighth* day of *July*, A. D. 1897, completed a location of the same as a mining claim of the length and width aforesaid, having substantially located the same and otherwise complied with all local rules and regulations, the laws of the State of Colorado and of the United States relating to mining claims.

The said discoverer and locator conveyed all his interest in the claim to *Chas. O. Baxter* and *Frank M. Taylor*, who by divers intermediate conveyances transferred the same to applicant, who thereupon took possession and

is the sole present owner, all of which will more fully appear by reference to the copy of the original record of location and the abstract of title herewith filed; the value of the labor done and improvements made upon said *Bear* lode mining claim by the applicant (and his grantors) being equal to the sum of five hundred dollars. Said improvements consist of discovery shaft, an incline, shaft house, a drift and *two-thirds interest in tunnel* (but expressly excepting and excluding from this application all that portion of the ground embraced in mining claim or survey designated as lot No. 2560 and the claim of Neals Mattson on the Gottenburg lode) in consideration of which facts and in conformity with the provisions of Chapter VI, Title 32 of the Revised Statutes of the United States, application is hereby made for and in behalf of said *C. A. Wolcott* for a patent from the United States for the said *Bear* lode mining claim, vein, lode or deposit and the surface ground so officially surveyed and platted.

C. A. WOLCOTT.

Subscribed and sworn to before me this *16th* day of *December*, A. D. 1907, and I hereby certify that I consider the above deponent a credible and reliable person, and the foregoing affidavit, to which was attached the field notes of survey of the *Bear* lode mining claim, was read and examined by him before his signature was affixed thereto and the oath made by him.

Henry Moody,
Notary Public.

[SEAL.]

Where an application is filed in the land office without proof that the plat and notice have been posted on the claim as required by R. S. § 2325, such application has been held void.—*1 L. D. 557; Rev. Ed. 545; 34 L. D. 583.*

This application "M" is attached to the transcript "H," commonly styled "The Approved Field Notes."

At the same time there should be prepared:

N.—The abstract of title.

O.—The proof of citizenship.

P.—The publisher's agreement.

Q.—The publication notice—which, with those already referred to, complete the first set of papers, to wit:

N. ABSTRACT OF TITLE.

STATE OF COLORADO, County of *Teller:* ss.

I, *Alex. W. Grant*, Clerk and ex-officio Recorder of said County, do hereby certify that the foregoing is a true,

full and correct abstract of title of the *Bear* lode therein described, as the same appears of record in my office, and shows all location certificates, deeds or other instruments appearing of record purporting to convey or affect the same.

Witness my hand and the seal of said County, this *16th* day of *December*, A. D. *1907*.

ALEX. W. GRANT,
[County Seal.] Recorder.

It should contain a memorandum of the location certificate, including any amended location certificates, and the usual memoranda of the deeds and other instruments appearing of record in his office, and should be brought *up to and include* the date of application, and should be certified to by the Recorder.—*Rule 42*.

The abstract often contains a copy of the location certificate, and in such case the recorder's certificate should be varied to state that it contains a true copy thereof; but the better practice is to mail with the application papers a certified copy of the location certificate (or certificates if there be more than one), *separately*, and after the filing of the "application papers" but during the period of publication to send the abstract proper, which in such case will contain only the memorandum of the location certificate with names, dates, etc., in the same manner as the memoranda of the separate deeds. This precaution is to make the abstract certainly *include* the date of the filing of the application.

When the applicant for patent is the original locator himself (and there have been no transfers of title), he should file as his abstract, a copy of his location certificate certified as follows:

STATE OF COLORADO, County of *Teller:* ss.

I, *Alex. W. Grant*, Clerk and ex-officio Recorder of said County, do hereby certify that the foregoing is a full, true and correct abstract of the title to the *Bear* lode therein described, as the same appears of record in said office, and that there are no deeds or other instruments appearing of record purporting to convey or affect the same except the certificate of location of which the foregoing is a true copy.

Witness my hand, etc., *as above*.

The Abstract Should Show Title in Applicant. —*Rule 42.* If it show title in several co-owners, all such co-owners should join as applicants. If it show a co-owner without interest in one or more claims of a group, the proceedings are a nullity as to such claims.—*32 L. D. 217.* If it show that there were co-owners who had been forfeited out for non-performance of annual labor, this is considered equivalent to an abstract showing transfer by deed from them to the applicant. A break in the chain of title behind a relocation made in the usual form to take up abandoned claims may be disregarded.—*10 L. O. 119.* But the Department will take notice of a void Sheriff's deed or other break in the title asserted and relied on by the applicant.—*21 L. D. 544.* Where the names of co-tenants are inadvertently omitted in the application they have been allowed to be supplied and the patent issued to all.—*10 L. O. 206;* but this is *irregular.*

O. PROOF OF CITIZENSHIP.

STATE OF COLORADO, County of *Teller:* ss.

C. A. Wolcott, being first duly sworn according to law, deposes and says that he is the applicant for patent for the *Bear* Lode Mining Claim, situate in *Cripple Creek* Mining District, County of *Teller,* State of Colorado;* that he is a native born citizen of the United States, born in the County of ————, State of ————, in the year ————, and is now a resident of *Boulder,* State of Colorado.

C. A. WOLCOTT.

Subscribed and sworn to before me this *15th* day of *December,* A. D. *1907.*

Henry Moody.
Notary Public.

[SEAL.]

When the applicant is not a native citizen the form after the * will proceed:

That he is a naturalized citizen of the United States; took out his final naturalization papers in the *Circuit Court of the United States at Denver, Colorado,* on the *first* day of *May, 1880,* and is now a resident of *Kokomo,* State of *Colorado.*

If the applicant has not taken out his final papers, it will show, as required by *Rule 68,* when,

where and in what Court he took out his first papers:

That he declared his intention of becoming a citizen of the United States in the *Circuit Court of the United States, at Denver, Colorado,* on the *first* day of *May, 1899,* and is now a resident of *Cheyenne,* State of Wyoming.

If the applicant claims under his father's naturalization, it will proceed:

That he is a naturalized citizen of the United States, born in the *Republic of Peru,* and that he came to the United States a minor, under the age of 21 years, and has ever since resided in the United States, and that his father took out his final papers and became a naturalized citizen of the United States during the minority of affiant, whereby affiant became a naturalized citizen under the terms of Section 2172 of the Revised Statutes of the United States, and is now a resident of *Aspen,* County of *Pitkin,* State of Colorado.

Serving in the army or navy does not complete citizenship of itself. Soldiers must comply with § 2166 and sailors with § 2174 of the R. S. or 28 Stat. L. p. 124.

Where there are several applicants each makes his own affidavit of citizenship.

Affidavit, Where Made.

By Act of April 26, 1882, the affidavit of citizenship, where the applicant resides outside of the land district, may be made anywhere in the United States, before any notary or Clerk of Court of Record where the applicant may reside or happen to be found.

Proof by Two Witnesses.

When the affidavit of the applicant cannot be procured the land office will allow proof of his citizenship by the affidavits of two disinterested witnesses.—*Rule 70.*

Citizenship of Corporation.

A corporation must file a copy of its charter or articles of association, certified to by the Secretary of State of the State within which it is operating, whether it be a domestic corporation or a corpora-

tion of some other State doing business in that State. —*Rule 66; 27 L. D. 351.*

Or it may file a "Certificate of Incorporation" and the Land Office will not pass on the point that it is not by its articles a corporation which could lawfully take title to mineral lands.—*20 L. D. 116; 22 L. D. 83.*

Entry secured by fraudulently suppressing the fact that it was for the benefit of an alien corporation will be cancelled and purchase price will not be refunded.—*20 L. D. 379.*

Proof of Non-Abandonment.

By circular of the General Land Office of March 24, 1887, *8 L. D. 505*, it was ruled that the register should require upon each application satisfactory proof of compliance with the annual labor law; but by the Revision of 1901 such proof is no longer required and the question is left by the Department to be settled by adverse claimants in the courts.—*Rule 55; 29 L. D. 302, 401; 31 Id. 69.* But a delay to make entry until beyond the end of the calendar year after publication, held fatal to the entry, where relocation for failure to do annual labor is alleged by protest.—*31 L. D. 69.*

P. PUBLISHER'S CONTRACT.

I, the undersigned, publisher and proprietor of the *Cripple Creek Star*, a weekly newspaper published in *Cripple Creek, Teller* County, State of Colorado, hereby agree to publish a notice dated U. S. Land Office, *Pueblo,* Colo., *December 15, 1907,* required by Act of Congress, approved May 10th, 1872, of the intention of *C. A. Wolcott* to apply for a patent for *his* claim on the *Bear* Lode, situate in *Cripple Creek* Mining District, County of *Teller*, State aforesaid, and to hold the said *C. A. Wolcott* alone responsible for the amount of our bill for publishing the same.

And it is hereby expressly stipulated and agreed that no claim shall be made against the government of the United States, or its officers or agents, for such publication.

Witness my hand this *16th* day of *December*, A. D. *1907.*

P. H. KNOWLTON, Publisher.

In What Newspaper.

The notice must be published in a newspaper to be by the *Register* designated as published near-

est to the claim.—*R. S. § 2325; 14 L. D. 138.* When there are two or more in the nearest town, either may be designated.—*Cameron v. Seaman, 13 M. R. 584; 2 L. D. 758.* The practice of the Register, where two or more local papers in the same town are published is to designate that one which the attorney may suggest. The distance is to be calculated not by an air line, but by the most usually traveled route. The language of the Act allows much discretion in the designation of the newspaper.—*17 L. D. 560; 26 Id. 145; 34 Id. 281.* But this discretionary power is subject to review by the department.—*32 L. D. 359, 611.*

The notice must be continued in the same paper and cannot be shifted from the daily to the weekly edition.—*3 L. O. 18.*

What Constitutes a Newspaper.

It must be a reputable newspaper of general circulation.—*2 L. D. 205; 758.* The Register has a discretion in deciding what constitutes such a newspaper.—*10 L. D. 655; 26 Id. 145.*

Q. PUBLICATION NOTICE.

This is verbatim the same as "K" and amounts to a fourth copy of "K," except that it is not signed by the applicant but is forwarded in blank to the land office where it receives the application number, is signed by the Register and returned by him to the attorney for claimant or direct to the printer.

It usually contains at the foot the dates of the first and last publications; but erroneous statement of last date will not excuse failure to file adverse within statutory period.—*25 L. D. 550.*

Manner and Period of Publication.

The notice "Q" must be published for 61 days in a daily, or nine consecutive times in a weekly paper.—*29 L. D. 230; Rule 45;* and while the notice is going through its newspaper publication, it also stands posted on the claim, and tacked to the bulle-

tin of the land office. Each of these methods of publication is mandatory and essential. *See p. 445.*

First Set or "Application" Papers.

The above mentioned papers, constituting the following list, to wit:

F.—The final plat—one copy.

H.—The approved field notes.

K.—The copy intended for posting in land office.

K.—Second copy with "L" proof of posting attached.

M.—Application for patent.

N.—Abstract of title.

O.—Proof of citizenship.

P.—Publisher's agreement.

Q.—Publication notice—which complete the first set of papers commonly called the "application papers," are all forwarded at one time by the attorney to the local land office.

Upon receipt of the application papers, accompanied by the filing fee of ten dollars, the register gives the papers an application number, makes a record of the application in the nature of an index, attests the posting of notice "K" in his office, affixing the date, and returns to the attorney for claimant the notice for publication "Q" headed with the application number, or sends it direct to the proper paper for publication. The return of the publication notice to the attorney or paper is an implied approval of the publisher's contract and a sufficient designation of that paper.

RECAPITULATION.

It may be convenient to review the proceedings at this point.

The papers A to I, inclusive, have performed their office.

A, the request for survey; C, the preliminary plat; D, the field notes, and F, the final plat, remain with the Surveyor General.

B, the order for survey, remains in the hands of the surveyor, being his voucher against the applicant for the work done under it.

E, G and I are mere certificates endorsed on other papers.

The transcript H (the approved field notes), has been attached to the application M, and both mailed to the local land office.

One copy of the plat F has been forwarded by the Surveyor General to the local land office to be kept on file; one copy has been posted on the claim, and one copy forwarded to the local land office as one of the application papers.

One of the notices K has been posted on the claim; one has been attached to the proof of posting; one has been posted in the land office, and one, Q, remains to be published or is being published.

L, the proof of posting; M, the application; and P, the publisher's agreement, have been filed in the land office.

N, the abstract, and O, the proof of citizenship, have been filed, or if not, may be filed at any time pending the publication.

The Second Set or "Final Entry" Papers which remain to be filed after the publication is complete, consist of:

R.—Proof of continuous posting.

S.—Proof of publication.

T.—Proof of sums paid.

U.—Application to purchase, to wit:

When the period of publication is complete, proof of the notice having remained on the claim and of the publication are made as follows:

R. PROOF THAT PLAT AND NOTICE REMAINED POSTED ON CLAIM DURING TIME OF PUBLICATION.

STATE OF COLORADO, County of *Teller:* ss.

C. A. Wolcott, being first duly sworn according to law, deposes and says, that he is the claimant, of the *Bear* lode mining claim, *Cripple Creek* Mining District, *Teller* County, State of Colorado, the official plat of which premises together with the notice of his intention to apply for

a patent therefor was posted thereon, on the *15th* day of *December*, A. D. 1907, as fully set forth and described in the affidavit of *John C. Clark* and *B. F. Pinson*, dated the *15th* day of *December*, 1907, which affidavit was duly filed in the office of the register, at *Pueblo*, in this State; and that the plat and notice so mentioned and described, remained continuously and conspicuously posted upon said mining claim from the *15th* day of *December*, A. D. 1907, until and including the *19th* day of *February*, A. D. 1908, including the sixty days' period during which notice of said application for patent was published in the newspaper.

C. A. WOLCOTT.

Subscribed and sworn to before me this *20th* day of *February*, A. D. 1908, and I hereby certify that the foregoing affidavit was read to the said *C. A. Wolcott*, previous to his name being subscribed thereto.

D. C. Crawford,
[SEAL.] Notary Public.

This affidavit of continuous posting the claimant may make from information derived from hearsay.—*9 L. D. 503.*

S. CERTIFICATE OF PUBLICATION.

(Copy of publication notice cut from paper and pasted here.)

I, *P. H. Knowlton*, do certify that I am Publisher of the Cripple Creek Star, a weekly newspaper published in *Cripple Creek*, in the County of Teller, and State of Colorado, and that the annexed notice was published in said paper once each and every week for nine consecutive weeks, the first publication being on the *18th* day of *December*, A. D. 1907, and the last publication being on the *12th* day of *February*, A. D. 1908. P. H. KNOWLTON.

The publisher's receipted bill is commonly attached to this blank.

Subscribed and sworn to before me this *20th* day of *February*, A. D. 1908.
Henry Moody,
[SEAL.] Notary Public.

Together with these proofs of publication and posting, the claimant forwards, under one of the instructions of the department, the following:

T. PROOF OF SUMS PAID.

STATE OF COLORADO, County of *Teller:* ss.

C. A. Wolcott, having been first duly sworn according to law, deposes and says that he is a citizen of the United States, over the age of twenty-one years; that he is the

applicant for patent to 1500 feet upon the *Bear* Lode, in *Cripple Creek* Mining District, *Teller* County, Colorado; that in the prosecution of such application he has paid the following sums of money, viz.:

For office work in the Surveyor General's office.....	$ 30
To *E. E. Chase*, Mineral Surveyor, for surveying and platting.....	50
To Register and Receiver, for filing application in Land Office.....	10
To the Cripple Creek *Star*, for publishing notice of application.....	20
To the Receiver of the local Land Office, for land....	45
	$155

C. A. WOLCOTT.

Subscribed and sworn to before me this *20th* day of *February*, A. D. 1908.

D. C. Crawford,
Notary Public.

[SEAL.]

These are the official costs only; it does not include attorney's fees, notary's charges, nor cost of abstract. The total expense of patenting one lode, without mill site, varies from $150 to $250.

The filing of this paper, T, completes the prerequisites of entry and payment except the formal application to purchase, U, and the register's proofs, V and W.

U. APPLICATION TO PURCHASE.

To the Register and Receiver United States Land Office, at Pueblo, Colorado.

The undersigned, claimant under the provisions of the Revised Statutes of the United States, Chapter VI, Title 32, and legislation supplemental thereto, hereby applies to purchase that *Mining Claim* known as the *Bear* lode, located in the west half of section 22, township No. 15, S. Range No. 69, west of the sixth principal meridian, designated as lot No. 11310, said lot No. 11310 extending 1,500 feet in length along said *Bear* vein or lode, but *expressly excepting and excluding* from this application all that portion of the ground embraced in mining claim or survey designated as lot No. 2560, the *Carnarvon* lode, and the claim of *Neals Mattson*, on the *Gottenburg* lode, and also all that portion of any vein or lode, the top or apex of which lies inside of said excluded ground, said lode mining claim embracing 8.011 acres in the *Cripple Creek* Mining District, in the County of *Teller*, and State of Colorado, as shown by the survey thereof, and hereby agrees to pay therefor *forty-five* dollars, being the legal price thereof.

Dated *Pueblo, February 20, 1908.* C. A. WOLCOTT.

I, *S. A. Abbey,* Register of the land office at *Pueblo,* Colorado, do hereby certify that the aforesaid mining claim or lot No. 11310 as applied for above, is subject to entry by the above named applicant; the area of said lode mining claim being 8.011 acres and the legal price thereof forty-five dollars.

February 20, 1908. S. A. ABBEY, Register.

U does not need to be verified.

Excluded Areas.

The notice and the application must show what areas are excluded and if the entry be of any such excluded areas a republication and posting will be ordered.—*22 L. D. 711; 28 Id. 436.*

Entry may embrace land excluded from application, but which, on adverse proceedings, was awarded to the applicant.—*29 L. D. 71.* May be amended to include a tract at first excluded on account of defective title.—*29 Id. 287.* Will not be allowed for land embraced in a prior subsisting entry.—*29 Id. 62.*

Entry—Cancellation—Relinquishment.

Entry cancelled without notice must be reinstated.—*23 L. D. 113; 31 Id. 51.* Cancellation does not subject claim to relocation.—*23 Id. 113;* but republication and posting is required.—*29 Id. 470; 31 Id. 37.* Reinstatement will not be made when entryman has filed adverse against subsequent application. —*26 Id. 608.* Entry may stand on proper proof where title is subsequently acquired.—*29 Id. 208.* Entry allowed by mistake pending adverse, will be cancelled.—*30 Id. 298.* A relinquishment during publication and before adverse claim is filed runs to the government though in terms made for the benefit of another claimant and the ground relinquished cannot thereafter be made the basis of an adverse.—*27 Id. 369.*

The Land Office has the right to cancel mineral entries for non-compliance with Statute or rule, although no adverse claim has been filed.—*Mineral Farm Co. v. Barrick, 80 P. 1055.*

The rejection of an application for patent or the cancellation of his receiver's receipt by the land office does not destroy the applicant's original title by location.—*Peoria Co. v. Turner*, 79 P. 915; *Rebecca Co. v. Bryant*, 71 P. 1110.

Register's Proof Completes Application.

Upon receipt of the final entry papers (R—U) accompanied by the purchase money (all other papers being regular) the Register makes his certificate that the notice "K" remained posted on his bulletin during the period that its duplicates were being posted on the claim and published, and makes his final certificate of entry.

V. REGISTER'S CERTIFICATE OF POSTING NOTICE FOR SIXTY DAYS.

[*Attached to Bulletin copy of K.*]

UNITED STATES LAND OFFICE,
At *Pueblo*, Colorado.
February 21, 1908.

I hereby certify that the official plat of the *Bear* lode, designated by the surveyor general as lot No. 11310 was filed in this office on the *16th* day of *December*, A. D. 1907, and that a notice, of which the attached is a copy, of the intention of *C. A. Wolcott* to apply for a patent for the mining claim or premises embraced by said plat, and described in the field notes of survey thereof filed in said application, was posted conspicuously in this office on the *16th* day of *December*, 1907, and remained so posted until the *19th* day of *February*, 1908, being the full period of sixty consecutive days during the period of publication as required by law; and that said plat remained in this office during that time subject to examination and that no adverse claim thereto has been filed.

S. A. ABBEY,
Register.

It is important that this bulletin notice, "K," should have been properly posted. The land office holds that it is essential that the three notices, to wit: by newspaper, by posting and by the bulletin should be concurrent, and in a case where the bulletin was not posted till the third day of advertisement they allowed an adverse on the 63rd day, holding that the double and contemporaneous publication was not until such day complete. The bulletin

must be posted 60 days, and the *newspaper notice does not begin to run* until the bulletin is posted.—*5 L. D. 510; 17 L. D. 282.* If any one of the three notices is insufficient they are all rendered valueless. —*29 L. D. 467.*

W. REGISTER'S FINAL CERTIFICATE OF ENTRY.

Mineral Entry No. 2,000. Lot No. 11,310. UNITED STATES LAND OFFICE, At *Pueblo*, Colorado. *February 21, 1908.*

It is hereby certified that in pursuance of the provisions of the Revised Statutes of the United States, Chapter VI, Title 32, and legislation supplemental thereto, *C. A. Wolcott,* whose postoffice address is *Boulder, Colorado,* on this day purchased that mining claim known as the *Bear* lode, in the west ½ of section 22, in township No. 15, S. Range No. 69 W. of the sixth principal meridian, designated as lot No. 11,310, said lot No. 11,310 extending 1,500 feet in length along said *Bear* vein or lode, expressly excepting and excluding from said purchase all that portion of the ground embraced in mining claim or survey designated as lot No. 2560, *Carnarvon* lode; *also the claim of Neals Mattson, on the Gottenburg* lode, and also all that portion of any vein or lode, the top or apex of which lies inside of said excluded ground; said lode mining claim, as entered, embracing 8.011 acres in the *Cripple Creek* mining district in the County of *Teller* and State of Colorado, as shown by the plat and field notes of survey thereof, for which the said party first above named this day made payment to the receiver in full, amounting to the sum of *forty-five* dollars.

Now, therefore, be it known that upon the presentation of this certificate to the Commissioner of the General Land Office, together with the plat and field notes of survey of said claim and the proofs required by law, a patent shall issue thereupon to the said *C. A. Wolcott,* if all be found regular.

S. A. ABBEY,
Regisfer.

Receiver's Receipt.

At the same time the receiver issues in duplicate the receiver's receipt and files the *original* with the papers, and delivers or sends the *duplicate* to the claimant, and all the preliminary proceedings are now complete. This receiver's receipt should be kept by the claimant until notice from the local land office that patent has arrived at such local land office, as its surrender is required before the patent is delivered. If mislaid, proof of loss must be made.

X. AFFIDAVIT OF LOST RECEIVER'S RECEIPT.

STATE OF COLORADO, County of *Teller:* ss.

In the *Pueblo* Land District, Colorado.

Before me, the subscriber, register of said land office, personally appeared *John Best,* who, being duly sworn, saith that he is the* applicant for a patent on the *Brelau* lode mining claim survey lot No. 7000 in *Cripple Creek* mining district, County of *Teller,* State of Colorado, and the same person who as such applicant made entry of said survey lot in the said land office on or about the *first* day of *June,* A. D. *1906.* That on the date of said entry he received the duplicate receiver's receipt therefor. That said duplicate receiver's receipt is lost or mislaid. That deponent has made diligent search among his papers and can not find the same, and can not therefore surrender the same. That he never assigned or purported to assign said receiver's receipt and still remains the owner and in possession of the land therein described and is the party entitled to receive the patent therefor.* Wherefore affiant asks that the patent to said survey lot be delivered to him without the surrender of said receiver's receipt upon this his affidavit of loss.

JOHN BEST.

Sworn and subscribed to before me this *eighth* day of *January,* A. D. *1908.*

S. A. ABBEY,
Register.

If the title has been transferred insert between the * *

"Owner by purchase of the *Brelau* lode, etc. (description). That he purchased the same since the same was entered for patent by deed from the party who made the entry. That he never received the duplicate receiver's receipt from his vendor, and does not know where the same can be found. That he has made diligent inquiry of the attorney and surveyor employed in the application for patent to said lode, who declare that they never had the same in their possession, and that the whereabouts of affiant's vendor are unknown to affiant." Wherefore, etc.

After Entry.

All proceedings after entry are ministerial. The papers in the local land office, except the copy of plat F, furnished by the Surveyor General, are forwarded to the General Land Office at Washington and the patent issues in due course usually arriving within one year, the department being behind in its office work; but this is upon the supposition that all the preliminary steps have been regular, and that the land was in fact open to entry—if material errors

or defects are discovered after the receiver's receipt issues, it may be, and often is, recalled and cancelled, and if land entered as agricultural is shown to be mineral at any time before patent issues, the same result follows.—*7 L. O. 23.*

Corrections and Additional Proofs.

The entire series of papers are reviewed at Washington and if irregularities, such as errors in survey, insufficient proof of improvements, errors in affidavits, etc., are discovered, the local land office is notified from the General Land Office, and (unless the mistake is a fatal one) the claimant or his attorney is, by letter from the local land office, notified to supply the defect by further affidavit or certificate, as the case may be.

Government Price $5 Per Acre.

The application papers (*p. 440*) are accompanied by the money to be paid on the land, being $5 for each acre or fractional part of an acre of the surface ground. The extreme limit of claim in Colorado being 1,500 feet long by 300 feet broad, such claim contains 10 and 33-100 acres; the fractional acre being paid for as one acre, makes the claim equivalent to 11 acres. The amount paid will therefore vary between $5 and $55 for a single lode location with no mill site. The price of placer ground is $2.50 per acre, or fraction of an acre.

Acreage of Lode Claims.

In computing this acreage all interfering surveys which have been deducted, are excluded. The payment is based on the amount of claimed surface ground covered by the survey and not excluded in favor of prior applications.

Claim	1500 x 600	feet	contains	20,66	acres.
"	1500 x 300	"	"	10.33	"
"	1500 x 150	"	"	5.16	"
"	3000 x 50	"	"	3.44	"
"	1400 x 50	"	"	1.60	"
"	1600 x 50	"	"	1.83	"

Affidavits—Where Made.

All affidavits made in support of the application must be made within the land district.—*R. S. § 2335; 34 L. D. 314; 35 Id. 455.* A possible exception to this is the publisher's affidavit (S) where the paper "nearest the claim" happens to be a newspaper in another land district. Another exception is the affidavit of citizenship.—*See page 436.*

Before What Officer.

They may be made before a disinterested notary public or any officer authorized to administer oaths. Among such officers are the register and receiver of the proper district. Where allowed outside the district they should be taken before a notary or the clerk of a court of record. In all cases the official seal should be attached.—*Rule 69.*

It has been ruled that any officer, as for instance the Clerk of the U. S. Court, whose jurisdiction extends over the territory of the land district, may administer the oath anywhere within his jurisdiction.—*3 L. O. 195.*

Where the Application Is Joint,

any one co-owner may make all the affidavits required, on behalf of his co-owners as well as on his own behalf, except the affidavit of citizenship.—*See p. 437.*

When a claim is owned in common, it is sometimes convenient to have a quit-claim executed by the others to one of their number, placing the title for the time being, in his name, the grantors securing themselves by title bond or otherwise.

Application by Agent.

"*Provided*, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: * * * —*A. C. Jan. 22, 1880.*

It does not seem that under the above Act a resident owner can apply at all by agent—unless at least temporarily absent.—*8 L. D. 223; 35 L. D. 434.* And the fact of absence should be recited in the power of attorney. In other words, he cannot delegate the power while he is present, by mere caprice or desire to avoid personal attention to the matter.

Where an application is by agency there must be a written power of attorney, the original of which is filed in the Land Office.

Y. FORM OF POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS, That I, *John Glenn*, of *Baltimore*, State of *Maryland*, a citizen of the United States, do hereby constitute and appoint *J. W. B. Smith*, of *Idaho Springs*, County of *Clear Creek*, State of *Colorado*, my attorney-in-fact, for me and in my name, to make application for patent of the United States, in the proper land office, upon the *Dragon* lode mining claim, 1,500 feet in length by 150 feet in width, situate on *Republican Mountain* in *Griffith* mining district, County of *Clear Creek*, State of *Colorado*, and to make or cause to be made, any and all surveys, relocations, affidavits, and all necessary papers which may be required in the prosecution of such application, or to perfect or protect the title thereto, and to do all acts and things in and about the premises which I myself, if present, could do, until patent is finally delivered. Also in case of adverse claim, I authorize him to employ counsel and take all measures necessary to defend against said adverse claim or suit in support thereof, either in the land office or in judicial proceedings, and in such judicial proceedings, to execute any bonds or other papers, and verify all proceedings, to and including appeal or writ of error.

Witness my hand and seal this *third* day of *February*, A. D. *1908*. JOHN GLENN. [SEAL.]

Acknowledge according to form on *p. 267.*

The deputy surveyor cannot accept such power nor act directly or indirectly as agent.—*Rule 93.*

In Each Affidavit Signed by Agent should be inserted, by way of precaution, the following clause:

"Affiant further saith that the said claimant is not a resident in the land district in which said claim is situate, but resides at *Tallahassee*, State of *Florida*, and that affiant is the duly authorized agent of said claimant, and is conversant with the facts sought to be established by said affidavit."

Where a Corporation Applies all papers are signed by the president, or other officer designated as stated in the next paragraph; but more usually (and advisably), it executes the form Y to some resident person or agent.—*See p. 437.*

Where it does not adopt the latter plan the land office practice requires proof that the officer purporting to act for the company was authorized to make the application. Such proof may consist of a copy of the resolution of the board of directors instructing some designated officer to apply for patent to the claim or claims mentioned, certified by the secretary under the corporate seal.

Mill Site Application.

Where a mill site is applied for separately it must be upon land occupied by mill or reduction works (*p. 239*). In such case the forms herein given, are sufficient, changing the word lode to mill site, and adding the two forms next following. The price per acre is also the same (*p. 235*). The applications for mill sites alone are rare, they being usually applied for in connection with a lode.

But the Land Office has ruled that the owner of a lode already gone to patent, who then held or afterwards secured title to a mill site which he uses as appurtenant to his mine, may apply for a patent to the mill site later by independent application, upon showing the use of the mill site in connection with the lode, the same as if he had originally joined both in one application.—*22 L. D. 496.*

Z. NON-MINERAL AFFIDAVIT.

STATE OF COLORADO, County of *Clear Creek:* ss.

Clarence Jarbeau and *Benj. C. Catren, Jr.*, each of lawful age and residents of *Georgetown*, in said County, being first duly sworn, each for himself, and not one for the other, saith: That he is a citizen of the United States; that he is well acquainted with the *Annie Boyd* mill site claim of *John A. Emery*, situate in *Queens* mining district, in said County, upon which said *John A. Emery* has applied for patent of the United States, and knows the character of said described land, having frequently been actually upon the same; that his knowledge of the land is such as to

enable him to testify understandingly with regard thereto; that there is not to his knowledge within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any placer, cement, or other valuable mineral deposits, or any deposit of coal; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for minerals during any part of the year by any person or persons; that said land is essentially non-mineral land, and that he has no interest whatever in said claim, or in said application for patent.

CLARENCE JARREAU.
BENJ. C. CATREN, JR.

Verification as in form BB.

The claimant is not required under the rules as amended to file his own affidavit to the same effect.—*Rule 65.*

Where a mill site is applied for in connection with a lode a second affidavit substantially according to the following form is required.—*13 L. O. 159.*

AA. PROOF OF MILL SITE USED FOR MINING (OR MILLING) PURPOSES.

STATE OF COLORADO, County of *Garfield:* ss.

Before me, the subscriber, a notary public in and for said County, personally appeared *C. N. Greig* (claimant), and *Harry Evans* and *James W. Ross* (witnesses), who being duly sworn each for himself and not one for the other, saith that he is a citizen of the United States and resides in said County. That he is familiar with the *Gagool* mill site, survey lot No. 7666 B, for which the said *C. N. Greig* has applied for patent in the United States land office at *Glenwood Springs,* Colorado. That the ground embraced in said survey is used or occupied by said claimant for *mining* purposes, to wit: *as a dump for the Quartermain lode; and contains an ore house used in the working of said lode; also a boarding house used by miners engaged in working said lode; also a tramway and Cornish jig used in operating said lode* (etc., as the case may be).

And the said *Harry Evans* and *James W. Ross,* severally, say that they have no interest whatever in said mill site or in the application for patent therefor.

C. N. GREIG.
HARRY EVANS.
JAMES W. ROSS.

Verification as in form BB.

The improvements must be in the nature of mills, flumes, ditches, or other things incidental to

milling or mining. Buildings and roads not used for such purposes cannot be considered; otherwise if they are so used. Trails off the claim, used for carrying ore have been accepted as part of the improvements.—*6 L. D. 220.* *See p. 240.*

It is generally advisable to apply for a mill site in connection with a lode claim; and in applying for a lode patent a mill site can be included and surface for building purposes readily acquired, at a cost of $50 less than if separate applications are made. *See pp. 234, 239.*

The lode is always distinguished as survey lot "A"—the mill site by the same number with the addition of "B." The mill site may be in another mining district or in a section different from that containing the lode.

In such application there must be a plat, and notice K posted on both lode and mill site; if not posted on the latter, republication will be required.—*25 L. D. 165; 27 Id. 373; Rule 63.*

The department has ruled that a lode intersected by a mill site or placer may be patented only to the edge of the intersecting claim.—*13 L. D. 146; 16 Id. 186; 26 Id. 675; 28 Id. 120;* and that such a location is not valid as to ground on the other side of the mill site.—*26 L. D. 675.* But by a later ruling both parts may be patented if the vein has been discovered on both sides.—*31 L. D. 359.*

Two mill sites not containing together more than five acres may be included in one application.—*2 L. D. 755.* *See p. 239.*

The land office distinguishes between a mere water right and a mill site.—*5 L. D. 190.* The use of a spring is not a mill site occupation.—*Id.*

PLACER PATENT.

Lodes and Placers Distinguished.

Only metalliferous deposits in place are considered lodes under the mining act.—*9 L. O. 165.* Everything else of a mineral character, *i. e.*, lands containing a mineral substance rendering them of more

value for the extraction thereof than for surface purposes, is treated as placer ground. The rulings on this point are cited on *pp. 210-212.* In addition to the cases there given it has been ruled that limestone for lime kiln purposes may be located as placer ground.—*9 L. O. 5;* and it cannot be located as a lode claim.—*23 L. D. 353; Id. 395.* Mica may be entered as a mining (presumably a placer) claim.—*2 L. O. 131.* Iron may be lode or placer, according to the nature of the deposit. A deposit of brick-clay does not make placer ground.—*6 L. D. 761; 31 L. D. 108.*

Placer claims require a material subdivision into—

(1) Claims located on unsurveyed lands.

(2) Claims located by adopting the governmental subdivisions of lands already surveyed.

Placer Patent on Unsurveyed Lands.

In applying for patent on a placer claim located upon unsurveyed lands the foregoing forms, with obvious alterations, will suffice.

In addition to such forms used for lode applications there must be filed in the Land Office with the first set of papers, proof that the placer contains no lodes (BB) excepting, of course, such as are especially applied for in the application itself, or excluded therefrom as the property of others, and a certified copy of the Descriptive Report (CC) based on L. O. Circular, September 23, 1882, *1 L. D. 544, Rev. Ed. 685,* now embodied in *Rule 60, p. 394.*

BB. PROOF THAT NO KNOWN VEINS EXIST IN PLACER CLAIM.

STATE OF COLORADO, County of *Gilpin:* ss.

John C. Jenkins and *Thomas H. Potter,* each of lawful age, and resident in *Central City,* in the said County, being first duly sworn, each for himself, and not one for the other, saith, that he is a citizen of the United States; that he is well acquainted with the *Keystone* Placer Mining Claim, situate in *Gregory* Mining District, County of *Gilpin,* State of Colorado, claimed by *John Wardell,* applicant for United States patent therefor; that for many years he has resided near to, and is well acquainted with the character of said land, having frequently passed over the same; that

his knowledge of said land is such as to enable him to testify understandingly in regard thereto, and that there is not, to his knowledge, within the limits thereof, any known vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, upon said claim or any part thereof, and further, that he has no interest whatever in the said placer claim.

JOHN C. JENKINS.
THOMAS H. POTTER.

Subscribed and sworn to before me, this *second* day of *February*, A. D. *1908*, and I hereby certify that the foregoing affidavit was read to the above named *John C. Jenkins* and *Thomas H. Potter*, previous to their names being subscribed thereto, and that deponents are reputable persons, to whom full faith and credit should be given.

Morris Hazard,
[SEAL.] Notary Public.

This affidavit must be made by two or more witnesses *(Rule 26)* and filed in the Land Office, together witht transcript FF, with the first set of papers.

The descriptive report the surveyor makes out without special instructions on receipt of "B" the order for survey, and forwards it, with the field notes of the survey, to the Surveyor General.

CC. THE DESCRIPTIVE REPORT.

*Survey No. *7000.*

Under General Land Office Circular "N," of September 23, 1882, upon the placer mining claim known as the *Hyena* placer, claimed by *S. G. Shaw*—situate in *Spanish Bar* mining district, *Clear Creek* County, Colorado, embracing 160 acres, in *section 8, township 3 S. range 73 W. 6th P. M.* Examination made *February 5, 1908, by Frank A. Maxwell*, U. S. Mineral Surveyor.

(*a*) The soil is a black loam, varying from 3 to 6 inches in depth, underlaid with auriferous gravel. The timber consists of a scattering growth of spruce and yellow pine trees, and along the banks of the creek there is a dense growth of small willows.

(*b*) Beaver Creek, a small stream about 10 feet wide, runs in a northeasterly direction through the claim.

(*c*) The workings upon the claim consist of an open cut 90 feet long, 20 feet wide and 10 feet deep. Course N. 80° E. The center of the westerly end bears N. 5° W. 30

*If on surveyed lands and conforming to legal subdivisions no survey number is given and no survey is required.

feet from corner No. 4. A ditch 850 feet long, 2 feet wide and 18 inches deep, course northeasterly, the head of which bears N. 3° E. 120 feet from corner No. 6. A shaft 3x6 feet, 10 feet deep, which bears from corner No. 4, N. 2° W. 75 feet, and a drift 3x6 feet, 18 feet long, which bears from corner No. 4, N. 37° E. 420 feet.

(*d*) This claim is located about three miles in a southeasterly direction from the town of Maysville, and one mile west of Clear Creek Junction.

(*e*) The Baker and Swansea lodes, located about three miles in a northerly direction from this claim, are the nearest well known lode claims. No lode has ever been discovered upon this claim or in the immediate vicinity.

(*f*) The claim is well adapted for placer mining purposes. Water has been brought from Beaver Creek to work the lower portion of the claim, and it can be brought from a point in the same creek about ¼ mile above to work the whole claim.

(*g*) The works or expenditures upon this claim, placed thereon by the claimant and his grantors, consist of an open cut 90 feet long, 20 feet wide and 10 feet deep. Course N. 80° E. The center of the westerly end bears N. 5° W. 30 feet from corner No. 4. Value $350. A ditch 850 feet long, 2 feet wide and 18 inches deep, the head of which bears N. 3° E. 120 feet from corner No. 6. Course northeasterly to the open cut mentioned above. Value $200. A shaft 3x6 feet, 10 feet deep, bears from corner No. 4, N. 2° W. 75 feet. Value $80.

(*h*) There are no salt-licks, salt-springs, mines other than the claimant's workings, nor mill seats upon this claim.

FRANK A. MAXWELL,
U. S. Mineral Surveyor.

I, *Frank A. Maxwell,* United States Mineral Surveyor, do solemnly swear that in pursuance of an order received from the United States Surveyor General for Colorado, dated February 2, 1908, I have made, under the provisions of General Land Office Circular "N," approved September 23, 1882, a personal and thorough examination upon the premises, of the placer mining claim of *S. G. Shaw,* known as the *Hyena* placer, situate in *Spanish Bar* Mining District, *Clear Creek* County, Colorado, embracing *160* acres, in *Section 8, Township No. 3, S. Range No. 73 W. 6th P. M.,* and that my report of such examination, hereto attached, is specific and in detail, and is a full and true statement of the facts upon all the points specified in said circular.

FRANK A. MAXWELL,

Subscribed and sworn to by the said Frank A. Maxwell, U. S. Mineral Surveyor, before me, a notary public, this *6th* day of *February, 1908.*

Frank J. Hood,
[SEAL.] Notary Public.

This descriptive report must be corroborated by the affidavit of one or more disinterested witnesses as follows—*Rule 60:*

DD. CORROBORATIVE REPORT.

STATE OF COLORADO, County of *Clear Creek:* ss.

William Cooper and *Patrick McNulty* being first duly sworn, each severally deposes and says that he is personally and well acquainted with the placer mining claim of *S. G. Shaw*, known as the *Hyena* placer, situate in *Spanish Bar* mining district, *Clear Creek* County, Colorado, embracing *160* acres, in *section 8, Township No. 3 S. range No. 73 west*, and also with the character of all the land included in said claim, and has been so acquainted for two years last past; that his knowledge of said claim and land is derived from personal observation, and is such as to enable him to testify understandingly with regard thereto; that he has carefully read the foregoing report of *Frank A. Maxwell*, U. S. Mineral Surveyor, and that to his own personal knowledge said report is in all respects true and accurate.

WILLIAM COOPER.
PATRICK MCNULTY.

Subscribed and sworn to by the above named persons before me, this *6th* day of *February, 1908.*

John Tomay,
[SEAL.] Notary Public.

The descriptive report CC with its Corroborative Report DD endorsed or attached, the Surveyor General approves in the following form:

EE. APPROVAL OF DESCRIPTIVE REPORT.

DEPARTMENT OF THE INTERIOR,
Office of U. S. Surveyor General,
Denver, Colorado, *February 19, 1908.*

I, *W. G. Lewis*, United States Surveyor General for Colorado, do hereby certify that the foregoing and annexed report of the examination of the placer mining claim of *S. G. Shaw*, known as the *Hyena* placer, made by United States Mineral Surveyor *Frank A. Maxwell*, under the provisions of General Land Office Circular "N," approved September 23, 1882; and under my instructions dated *February 3, 1908*, has been carefully examined and conforms in all respects to the requirements of said circular; and said report is hereby approved.

W. G. LEWIS,
U. S. Surveyor General for Colorado.

After endorsement of such approval, the Surveyor General certifies a

FF. TRANSCRIPT OF DESCRIPTIVE REPORT,
Including its exhibits or endorsements DD and EE as follows:

GG. CERTIFICATE TO DESCRIPTIVE REPORT.

DEPARTMENT OF THE INTERIOR,
Office of U. S. Surveyor General,
Denver, Colorado, *February 19, 1908.*

I, *W. G. Lewis,* U. S. Surveyor General for Colorado, do hereby certify that the annexed is a full, true and correct copy of the report, made under the provisions of General Land Office Circular "N," approved September 23, 1882, and of the affidavits and approval attached to said report on the placer mining claim of *S. G. Shaw,* known as the *Hyena* placer, situate in *Spanish Bar* mining district, *Clear Creek* County, Colorado, Denver land district, as the same appear on file in this office.

W. G. LEWIS,
U. S. Surveyor General for Colorado.

This transcript so certified, together with the field notes and plats, is sent to the claimant or to the surveyor who is supposed to deliver all papers to the attorney for the applicant to enable him to make out the notices "K" which he causes to be posted and published, and proceeds in all further respects the same as on application for lode patent.

Application for Patent on Surveyed Lands.

The language of the Congressional Act as to this class of claims is obscure, but it seems that where a placer deposit is found on surveyed lands, discovery, location and record must be made exactly as in the case of discovery on unsurveyed public domain, except that instead of a description by metes and bounds, the location certificate should describe it as the *northeast quarter of section 8, township 10, etc.,* using one name for each twenty acres and not claiming more than 160 acres by one record. It is advisable to give it a name as in other cases.

Although already surveyed it should be staked, marking the stakes with the name of the claim and number of the corner to indicate the appropriation, replacing the government stakes if not then found. *See p. 218.*

When the placer application is for an exact quarter section, or a series of forties or tens recorded and adopted as the *claim*, no order for survey, survey, plat or field notes are required, their office having been fulfilled by the prior government survey already made and platted with the Surveyor General, and the application may be made in the Land Office without any proceedings whatever in the Surveyor General's office.

The proof of $500 expenditure in such case should be made by the affidavit of two or more disinterested witnesses acquainted with the claim.—*25 L. D. 550; Rule 25.*

The descriptive report in such cases is not obligatory.—*7 L. D. 390.* And the Commissioner of the General Land Office, by letter of October 20, 1900, to the Surveyor General of Colorado, instructed that office that, where legal subdivisions are taken, a descriptive report, though approved by the Surveyor General, would not be official unless specially required by the Department.

The circumstances in which such report would be required by the department are uncertain, but when required, would doubtless be ordered through the office of the Surveyor General.

If any ground is excepted so that the claim is not an exact conformation to the subdivisions an official survey is required.—*6 L. D. 580;* in which case the report would doubtless be necessary; but no official survey is required if the excluded ground be patented.—*31 L. D. 64.*

Where a Placer Contains Known Lodes Owned by the applicant, they are applied for as parcels of the placer application and are especially designated on the survey by their names but without separate numbers and platted each with a width of 50 feet, or with the full width, if so located, and the claimant elects to survey them for such full width, and to pay the lode price for such full width. If such lodes have never been previously located a for-

mal discovery and record of the same should be made and abstract filed the same as for placer.

In requesting order for survey name the lodes, *i. e.*, insert in form "A" *The Special Delivery Placer, including three known lodes, to wit: The Silence, The Security and The Celerity, etc.*, and send copies of location certificates of each lode.—*See p. 419.*

Where the lode and placer do not touch they cannot go in the same application.—*5 L. O. 162.*

Patenting Known Lode Within Placer Patent.

Although known lodes are distinctly excepted from the placer patent and the department originally recognized this exception *(7 L. O. 100)* it was later ruled in the case of the *Pike's Peak Lode, 10 L. D. 200; 14 Id. 47*, that the land office would not issue patent to the owner of such excepted known lode unless the placer patent had been either judicially set aside to the extent of the ground covered by the surface of the known lode or the placer owner had quit claimed such surface back to the United States so as to revest the title in the government.

This untenable position of the department was persisted in until the *South Star Lode case, 20 L. D. 204*, was decided, where the whole subject was reviewed and the ruling made that patent may issue to the lode owner "when it had been ascertained by inquiry instituted by the department" that a lode was known to exist at the date of the application for the placer patent, as well as in cases where a judicial decree to the same effect had been rendered. The result of this ruling is that the lode owner may now apply for patent as in any ordinary case after first obtaining from the land office an order to ascertain whether the lode was known to exist before the placer entry. *Butte Co. 21 L. D. 125.* No rules have been since published directing how much inquiry should be made, but doubtless it would be required to give notice to the holder of the placer patent, who would be allowed to appear and contest the petition for the order.—*27 L. D. 676. See p. 223.*

If the application is allowed, the placer claimant, if he contests the fact that there was any valid known lode on the proper date, should file his adverse claim or doubtless he could allow the patent to proceed and still contest, in ejectment brought by either side, the validity of the later lode patent, as in the case of *Iron S. Co. v. Campbell, 16 M. R. 218.* Instance where patentee of placer was not permitted to subsequently patent a lode within the patented placer.—*27 L. D. 661.*

As to What Constitutes a Known Lode, the rulings are that there must be mineral worth working disclosed at the time of the placer entry.—*10 L. D. 156; 13 Id. 86.* And the general test on this class of points seems to be that the land as a lode claim must have been of greater value than for the agricultural, mill site, placer or other use, under which it was applied for and granted.—*12 L. D. 612; 14 Id. 54.* *See p. 224.*

Necessity to Adverse.

Although not bound as in the case of lode against lode or placer against placer by failure to adverse, the lode claimant is under the practical necessity to file and maintain his adverse, in order to place his rights beyond cavil and secure an express exception of his lode, or a patent under the same proceedings.—*See p. 226.*

Group Claims.

In the case of the *St. Louis Co. v. Kemp*, decided in 1881 *(11 M. R. 673)*, a placer had been patented in excess of 160 acres. The Supreme Court sustained the patent, and in support of their decision asserted that a miner's *claim* might consist of several *locations;* that several contiguous locations being purchased by one man became his claim. They say: "Such is the general understanding of miners and the meaning they attach to the term." Even what seem to us the erroneous impressions of our court of last resort command respect and its decisions

are none the less law, even though they compel us to accept new meanings to the words of our language. In fact where claims under district rules were limited to 100 feet square or other small dimensions, it has been very common to buy up many such claims and record them as one location. The interpretation was, nevertheless, strictly within the province and range of judicial construction.

Prior to the *Kemp case, supra*, the Land Office had treated each lode location as a single mining claim and the practice was to allow but one to be applied for in one proceeding. After the *Kemp case*, the Department began to allow applications for groups of lodes, permitting any number of full lode claims to be patented as one claim, and requiring only $500 expenditure on the entire group. The only restriction imposed was that the several claims should be contiguous; i. e., should overlap or touch, not merely corner with each other.—*35 L. D. 485*.

This manifestly wrong construction was adhered to until the publication of what is now *Rule 48* of the regulations requiring $500 on each location or for the group the aggregate of $500 multiplied by the number of locations. In his official letter of June 21, 1898, *27 L. D. 91*, the Hon. Secretary considers the whole matter and comes to a correct definition of the term "claim," as being the equivalent of the word "location."

Although we have always believed that the intent of the Act of Congress was to require every lode location to make a separate application, it has now become the settled practice of the Land Office to allow group applications and when perfected by patent the patent would doubtless be upheld.

Where several lodes are thus applied for, or where a placer includes lodes, they receive only one survey-lot number, but the corners of each are given a separate consecutive numerical designation, beginning with Cor. No. 1 in each case, which must be connected with a government corner or U. S. monument.—*Rules 135, 151.* The survey and plat should

show the boundaries of each location.—*5 L. D. 199; 6 Id. 808; 29 Id. 585.*

A group composed of lodes and placers may be patented if contiguous.—*29 L. D. 7.*

The rejection from entry of one claim of a group is a rejection of the application to that extent only.—*32 L. D. 220.*

What Constitutes Improvements.

Underground workings, cross-cuts or tunnels (on or off the ground, provided they are held by applicant for its benefit, and are *bona fide* intended to cut it), buildings, roads, flumes, fixed machinery, etc., or the result of any other *bona fide* expenditures, constitute improvements.—*Rule 157.*

Roads, to the extent they are on the claim: boarding-house, office, bunk-house, blacksmith-shop and powder-house, when shown to be essential to operations.—*34 L. D. 556.*

Excepting labor which leaves no trace of itself, such as hoisting water, whatever counts for annual labor will count for the $500 improvements.—*See p. 100.*

Undivided interests in tunnels, etc., held in common with parties who are not applicants, are allowed to count as parcel of the necessary $500 improvements.

The value of a common improvement, such as a shaft or tunnel, must be distributed equally to all the claims in the group.—*35 L. D. 361.*

Old Improvements on the Ground may be purchased from the rightful owners, and so enure to the benefit of the applicant. The deed conveying them should be a quit claim of all vendor's interest in the claim under the name by which patent is sought, and of all improvements thereon, etc., and where abandoned property is relocated or jumped, the old improvements do not count without such purchase.—*30 L. D. 289, 322.* The department in an early circular intimated that they could not even be purchased *(Copp, M. L. 259)*, but it later

ruled that the purchaser is entitled to the benefit of all expenditures made by his grantor.—*21 L. D. 440.* Work done on placer prior to location held to count.—*20 Id. 455.*

What Not Sufficient.

Among improvements cannot be counted dwelling houses or other structures, machinery or roadways not associated with mining.—*Rule 157.*

Quarrying marble on one claim will not count for other claims in the group.—*32 L. D. 85.* Successive development, as working up stream from lower placer, held insufficient for upper placer.—*32 L. D. 402.* Improvements on a group will not be credited on an adjoining claim if any of its owners have no interest in the group.—*32 L. D. 595.*

The Department refused to accept a stamp mill though upon the claim and used exclusively to work the ore it produced on the technical ground that treatment of the ore is not a mining but a post-mining expenditure.—*35 L. D. 493.* We cannot see how such ruling can stand under the unqualified words of the Statute: "improvements made upon the claim."

Completed Pending Publication.

It is not essential that the $500 worth of improvements should exist on the ground at the time of the survey. They may be completed at any time during the period of publication.—*29 L. D. 491.* In such cases the Surveyor General endorses diagram "F" with a certificate not containing the latter part of "G." The surveyor in his field notes describes such improvements as may exist, and adds, in substance: "These improvements are not worth $500." When completed the surveyor sends a special affidavit to the Surveyor General, who files it and forwards his certificate to the surveyor, or to the land office direct, if the surveyor so request. An extra deposit of $5 is required when this affidavit is made subsequent to the first filing of field notes.

The department holds (overruling previous decisions), that the statutory requirements (*R. S. Sec.*

2325) as to the Surveyor General's certificate of improvements is directory only, and that it may be made after the expiration of the sixty days' publication.—*25 L. D. 550; 26 Id. 122.*

Where the Applicant Dies Before Entry.

On filing proof of decease the papers are perfected either by an heir or the executor or administrator, and patent issues to "the heirs of" the applicant.—*28 L. D. 14.*

Where he dies after entry the patent issues in the name of the deceased.—*2 L. D. 762.*

Application by Trustee.

Any party applying to make entry as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust;* and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.—*Rule 54.* A claim cannot be patented for the benefit of a foreign corporation.—*10 L. D. 641; 20 Id. 379.*

Patent to Assigns.

On bringing up abstract to date the land office has issued patents to purchasers from the entry-man. But as the deed carries the patented title this is not necessary; nor is it regular. The land office cannot be presumed to follow title after entry, and might by such procedure issue it to a party not entitled in equity to take it.

Under present practice the Department disregards all transfer of interests in the claim and issues patent direct to the applicant.—*33 L. D. 127; Rule 71.* But the deed of the applicant carries the patented title when granted to the buyer.—*Slothower v. Hunter, 88 P. 36.*

Application Without Record Title.

Where the title is old and complicated a party may, without filing abstract supply the same by

affidavits under R. S. § 2332, as explained by Land Office Rules 74-77, that he has worked and possessed the claim for the limitation period of seven or other number of years fixed by the local Statute.

Application for Part of Claim.

An owner applying for patent on part of his claim including the discovery shaft was held not to have abandoned the other end of his claim in *Miller v. Hawley, 74 P. 980.*

But where the applying claim was divided into two parcels and under compulsion of a land office ruling the applicant elected to enter but one it was held that such election was an abandonment of the other parcel.—*Gurney v. Brown, 77 P. 357.*

Conflicting Applications.

Where an application is pending or entry has been made, a subsequent application for the same land should not be accepted.—*26 L. D. 81; 29 Id. 29, 114, 226; 31 Id. 59; 32 Id. 220;* and no adverse need be filed against a subsequent application erroneously accepted.—*29 Id. 160; Steel v. Gold Co. 18 Nev. 80.* An adverse suit by entry-man does not waive rights acquired under the entry.—*29 L. D. 114.* But the government will, in some instances, take notice of an adverse by prior applicant and stay proceedings.—*22 Id. 629; 25 Id. 263.*

The Surveyor General gives to any applicant an approved survey showing the conflicts with prior surveys, but not excluding them as against the survey asked for, and allowing the claimant to proceed as he may or can, to apply for patent for the entire ground within his exterior lines, although wholly or partly covered by previous patents. It is left to the land office to bar the application so far as it pretends to include ground previously patented or applied for. —*See p. 139.*

Variance Between the Locus and the Record of Claims.

Where no conflict between official surveys is shown by the records but a conflict in fact exists; or, where a conflict is shown by the records when none in fact exists as the claims are staked on the ground, the Department will order a hearing to determine the actual *locus* of the claims.—*33 L. D. 91, 183.* *See p. 56.*

Rulings as to Posting.

The notice "K" must remain posted on the land office bulletin during the whole period of sixty days —and the 60 days do not begin to run until it is posted.—*1 L. D. 584; Rev. Ed. 572; 5 L. D. 510.*

Posting notice inside an *open* shaft house or on the shaft house held to be in a "conspicuous place." —*9 L. O. 113; 22 L. D. 624;* enclosing notice and plat in oil-cloth envelope appropriately marked and tacked to post held sufficient.—*33 L. D. 238;* but placing notice in a box on the ground among large boulders and not near shaft, held not a conspicuous place.—*21 L. D. 336.*

Allowing Application to Sleep.

Failure to prosecute application to completion within a reasonable time after termination of proceedings constitutes waiver of rights secured under the application.—*29 L. D. 62, 301, 308, 359, 401; 35 Id. 27; Rule 56.* A delay beyond the end of the calendar year after publication held fatal, where a hostile relocation had been made.—*31 L. D. 69; 32 Id. 200.* An excusable delay must be one caused by adverse proceedings under the mining laws.—*34 L. D. 56.*

Miscellaneous Rulings on Patent Application.

Where application is begun in the wrong land district proceedings must be *de novo*, after error discovered.—*17 L. D. 282.*

In the case of the *Alaska Placer*, which was partly in one land district and partly in another, the Secretary ruled that posting on the claim and in the Land Office, and the newspaper publication must be made in both districts.—*34 L. D. 40.* This ruling necessitates practically a separate and complete application in each district.

When the land office is closed during a part of the period of 60 days the time of closing should not be counted as part of the advertising period.—*1 L. D. 584; Rev. Ed. 572.* A claim already patented cannot be made the basis of a second application for more surface.—*9 L. O. 113.*

A co-owner omitted from application cannot by subsequent forfeiture proceedings against the applicant, acquire right in himself to make entry.—*32 L. D. 93.*

A discovery on the dip of a lode whose apex is inside a prior valid location is void, and on protest alleging that fact the department will determine the question.—*33 L. D. 142.*

Surveyors General and Deputy Mineral Surveyors are disqualified as applicants for mineral land. —*29 L. D. 333.*

Limitation of Entries.

The A. C. of 1889 *(1 Sup. 792)* limiting the total acreage of the aggregate of entries under all the land laws to 320 acres to one individual, is construed by Act of 1891 *(1 Sup. 946)* to not apply to mineral entries.

ADVERSE CLAIM.

Sixty Days to File.

R. S. Sec. 2325. * * * —If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and

thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Extent—Boundaries—Stays Proceedings.

R. S. Sec. 2326.—Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

Thirty Days to Bring Suit.

It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

An adverse claim must be made during the period of sixty days publication, which is construed to mean or on before the sixtieth day after the date of first newspaper publication, such date being *excluded* in the calculation.—*13 L. D. 286.* *See p. 475.*

The proceedings are as follows: the adverse claimant subscribes and verifies his

HH. ADVERSE CLAIM.

United States Land Office at *Pueblo,* Colorado:

In the matter of the application of *C. A. Wolcott* for a United States patent to the *Bear* Lode mining claim, situate in *Cripple Creek* mining district, County of *Teller,* State of Colorado.

To the Register and Receiver of the United States Land Office, and to the above named claimant:

WHEREAS, *C. A. Wolcott* did, on the *16th* day of *December,* A. D. *1907,* file in the district land office of the United States, at *Pueblo,* Colorado, a certain plat of a survey of a certain lode, together with his application for a United States patent for said lode, naming and calling the said lode in said plat and application the *Bear* Lode situate in *Cripple Creek* mining district, County of *Teller,* State of Colorado; said survey and plat being designated as mineral survey No. 11,310, and consisting of 1500 linear feet, together with surface ground 300 feet in width; and the said *C. A. Wolcott* did, at the same time and place, give notice

that he would apply for a United States patent for the above described lode and premises in substance as follows:

[*Here attach copy of newspaper publication.*]

AND WHEREAS, The first publication of said notice of said application appeared in the *Cripple Creek Star*, a weekly newspaper published at *Cripple Creek*, in said County and State on the *18th* day of *December*, A. D. *1907*.

NOW THEREFORE, I, *Edward F. Bishop*, a citizen of the United States over the age of twenty-one years, residing in and my postoffice address being *Denver*, in the County of *Denver*, in said State, do, on this *third* day of *February*, A. D. *1908*, enter this, my protest, and adverse claim against the issuing of a patent to the said *C. A. Wolcott*, for his pretended claim upon the so-called *Bear Lode*, as set forth in his said plat and field notes as aforesaid, for the following reasons, to wit:

1. The surface ground and veins or lodes contained therein as set forth and described in the plat and field notes of the said *C. A. Wolcott*, or a great portion thereof, are not the property of the said applicant, neither is he entitled to hold the same under or by virtue of the local laws, rules and customs of miners in said mining district, the laws of the State of Colorado, or the Statutes of the United States relating to mining claims.

2. Because a great portion of the premises described in said plat and notice of said applicant, and claimed by him as the so-called *Bear Lode*, is claimed adversely, and is owned by this protestant, and is in fact a portion of the premises claimed and owned by this protestant as the *Elephant* Lode, as will appear by reference to an abstract of title herewith filed, made a part of this protest and marked Exhibit A.

3. Because this protestant (and his grantors) have held, occupied and possessed a great portion of the premises set forth and described by the said *C. A. Wolcott* in his plat and notice of the so-called *Bear* Lode, long prior to the pretended discovery and location of the so-called *Bear* Lode; such occupation and possession of this protestant (and his grantors) having been under and by virtue of a full compliance with the local laws, rules and customs of said mining district, and the laws of said State, and of the United States, pertaining to mineral lands.

4. Because this protestant (and his grantors) have held, occupied and possessed all that portion of the so-called *Bear* Lode, as represented on the plat of a survey made by *Thomas L. Darby*, United States mineral surveyor, and colored *red*, said plat of said survey being herewith filed, marked Exhibit B, and made a part of this protest, and have held, occupied and possessed the same long prior to the pretended discovery and location of the so-called *Bear* Lode. And this protestant is the original discoverer and locator of said *Elephant* Lode (or is a *bona fide* purchaser for a valuable consideration, from or through the original discoverer and locator of said *Elephant* Lode, by conveyances), as shown on said abstract. *See Rule 81.*

5. Because a valid discovery, location and record of said *Elephant* Lode was made by this protestant (or his grantors), in strict compliance with said local laws, rules and customs, and the laws of the State of Colorado and of the United States, and while the same was vacant mineral land of the United States open to occupation long prior to any pretended discovery or location thereof by said *C. A. Wolcott* (or his grantors) and said *Elephant* Lode hath been occupied and possessed as aforesaid, ever since its discovery as aforesaid, by this protestant (and his grantors), under and by virtue of such discovery, location and record.

6. Because the discovery shaft of the so-called *Bear* Lode was not of the legal depth of ten feet from the lowest part of the rim at the surface, as required by law at the date of the pretended record of the same, and has never been since sunk to that depth. 7, etc., 8, etc.

WHEREFORE, This protestant enters this his protest and adverse claim against the issuance of a patent to the said *C. A. Wolcott* for his claim upon the so-called *Bear* Lode.

ED. F. BISHOP.

STATE OF COLORADO, County of *Teller:* ss.

On this *3d* day of *February*, A. D. *1908*, before me, the subscriber, a Notary Public in and for said county, personally appeared the above named *Edward F. Bishop*, who being first duly sworn, saith that he is the adverse claimant named in the foregoing protest and adverse claim above subscribed by him. That he has read the same and knows the contents thereof; that the same is true in substance and in fact; and that the said adverse claim is made in good faith and to protect his better and prior title.

ED. F. BISHOP.

Sworn and subscribed before me, this *3d* day of *February*, A. D. *1908*.

E. H. Gruber,
Notary Public.

[SEAL.]

To the above reasons others may be added where specific facts are known going to the invalidity of the claim sought to be patented, but in every case allege that the claims conflict and that the adverse claimant is owner of the conflicting area and veins, as in paragraph No. 2 of the above form. The first five paragraphs constitute a good statement of an adverse right, according to the various land office rulings and others are added only as precautionary.

Exhibit "A" Is an Abstract of Title certified as in form "N" and should contain a copy of the Location Certificate. But failure to file the abstract

within the period of publication *(15 L. D. 45)* as well as failure to furnish the certified copy, have been held not fatal.—*14 L. O. 237.*

Exhibit "B" Is a Plat made by a U. S. mineral surveyor, showing the interference of the two claims certified as follows:

> I hereby certify that the above diagram correctly shows the Elephant Lode in its entirety. its relative situation or position to the Bear Lode and the extent of the conflict claimed to exist between said Bear Lode and said Elephant Lode as actually surveyed by me.
>
> *Thomas L. Darby,*
> U. S. Mineral Surveyor.

When it is impossible to procure an actual survey, as of a snow-bound claim, an adverse claim showing the nature, extent and boundaries of the conflict, stating the reasons why the claim could not be reached for survey, will be sufficient.—*1 L. D. 592; Rev. Ed. 582; Hoffman v. Beecher, 31 P. 92.* The plat need not be made by a U. S. surveyor.—*27 L. D. 358; 29 Id. 460; Anchor v. Howe, 50 F. 366.*

No plat required where claimant and adverse claimant hold by legal subdivisions.—*Rule 82.*

Improvements.

The amount of improvements on the adversing claim is immaterial, and though formerly required, need not, under the present rules, be shown, or their value stated.—*Rule 82.*

Separate Adverse Claims.

Where there are several *Applications* to be adversed by a single lode, a separate Adverse Claim with its Plat and Abstract must be filed in each case. Where the adverse claimant has several lodes with which he intends to adverse a single application, the practice is to combine them in a single Adverse Claim.

Where and by Whom Verified.

An adverse claim is usually verified by the adverse claimant or one of the adverse claimants and within the land district.

But by act of April 26, 1882 (*post p. 512*), it may be verified by the adverse claimant beyond the land district, or by an agent or attorney in fact cognizant of the facts stated, who must swear to his agency and furnish proof thereof.—*Rules* 78, 79. Such agent must make his verification in the land district.—*Rule 80; 34 L. D. 314.* A corporation verifies either by its executive officer (president) or its agent thereto authorized. And if the adverse claimant is a nonresident or absent from the district and verifies it personally he may make such verification wherever he may be, before the clerk of any court of record or a notary public, anywhere within the United States.

In cases of emergency it is a legitimate expedient to have the intending adverse claimant convey to a third party within the district, who then makes and verifies the adverse claim precisely as if he were the real, as he becomes in fact the legal, owner of the adversing claim. But since the Act allowing verification by the adverse claimant beyond the district, or the filing by an agent, this course need seldom be resorted to.

Form of Adverse and Verification by Agent.

Proceed as in form "HH" to the last paragraph and insert:

Wherefore this protestant, by *Charles T. Limberg*, his duly authorized agent and attorney in fact, who is personally cognizant of the facts herein stated, enters this his protest and adverse claim against the issuance of a patent to the said *C. A. Wolcott* for his claim upon the so-called *Bear* Lode.

EDWARD F. BISHOP,
By *Charles T. Limberg*,
His agent and attorney in fact.

STATE OF COLORADO, County of *Teller:* ss.

On this *third* day of *February*, A. D. *1908*, before me, the subscriber, a Notary Public in and for said county, personally appeared the above named *Charles T. Limberg*, who

being first duly sworn, saith that he is the duly authorized agent and attorney in fact of the above named *Edward F. Bishop,* adverse claimant named in the foregoing protest and adverse claim above subscribed by affiant as will further appear by the copy of his power of attorney hereto attached marked Exhibit C; that affiant has read the foregoing protest and adverse claim, and is cognizant of the facts therein stated, and that the same is true in substance and in fact, and is made in good faith to protect the prior and better title of his said principal.

CHARLES T. LIMBERG.

Sworn and subscribed before me this *third* day of *February,* A. D. *1908.*

E. H. Gruber,
Notary Public.

[SEAL.]

By Co-Owner.

A single co-owner may make and verify the adverse claim "*on behalf of himself and his co-owners,*" which phrase should, in the form "HH," follow the name of the protestant whenever it occurs or where the context requires it, when an adverse is so made.

And it is held that one co-owner may adverse although another co-owner refuse to join him.

And one co-owner cannot withdraw his adverse so as to prejudice another who has joined with him.

Against Co-Tenant.

Where one or more co-tenants apply for patent, omitting the name of one or more of their associates, the title received enures to the benefit of all the co-owners.—*Turner v. Sawyer, 150 U. S. 578; Brundy v. Mayfield, 38 P. 1067; Malaby v. Rice, 21 M. R. 29.* Nevertheless, the legal title passes by the patent, to the patentees and to them only; and while the ousted co-tenant will, in equity, upon proper proceedings be declared a beneficiary under the patent, yet if he is aware of the proceeding in time and has opportunity, undoubtedly the better course is to adverse. By *Rule 53* the Land Office regards a co-tenant in such case as a protestant rather than an adverse claimant and does not require suit in support of the protest; but if he elects to bring suit the application will be stayed to await its determination.—*25 L. D. 495; 26 Id. 220.* On protest filed the Department will give

co-owners opportunity to litigate in Court the disputed title.—*30 Id. 364.* The distinction here attempted is refined. There is nothing in the *Turner case* construed in *25 L. D. 495* to intimate that a co-tenant may not, if he wish, file his adverse claim.

The provisions of § *2325* were intended only to apply to adverse claims arising out of conflicting locations, and not to controversies between co-owners. But if one co-tenant be ousted he has the common-law right to sue, and it does not weaken his case that he has filed an adverse claim and brings suit in support of it.—*Davidson v. Fraser (Colo.), 84 P. 695.*

Time to File.

The period is strictly limited to sixty days excluding the first day.—*13 L. D. 718; 28 Id. 224.*

To instance: where first publication was on October 19 they excluded the first day and count—

October 12 days;
November 30 days;
December 18 days;

total 60 days, and made December 18th, the last day on which an adverse could be filed.—*13 L. D. 286; 16 L. D. 101.*

Time Cannot be Extended.

No adverse claim can be received after the expiration of the statutory period, and the Department is without authority to enlarge the time for filing.—*29 L. D. 467.*

So also the 30 days time allowed for commencing suit cannot be extended; the law limiting the period is mandatory; if the papers intended to commence suit are delayed in the mail, or action is delayed through the agency of an attorney corrupted, the Land Office can afford no relief.—*2 L. D. 707; Sickel, 190, 320.* But the Department will not review a judicial determination that a suit was initiated within the statutory period.—*23 L. D. 20.*

Republication.

When for any cause a republication is required, the adverse claim must be re-filed during the second period of advertising; but no additional filing fee is charged.—*Sickel, 313.*

Where there has been a material misdescription in the published notice a republication (and in this case a resurvey) will be ordered, although applicant has already made final entry.—*17 L. D. 565.*

Sunday—Holidays.

It has been ruled that an adverse may be filed on Sunday, when the last day falls on Sunday; and out of office hours on any day; but that the receiving and filing out of office hours, or on Sunday, is not compulsory upon the officers.—*6 L. O. 73; 23 L. D. 546.* That if the 60th day fall on Sunday the adverse is too late if filed on the succeeding Monday. —*34 L. D. 568*, overruling contrary holdings in *8 L. D. 430* and *13 L. D. 718* where the last day fell on a legal holiday.

Amendment.

An adverse claim cannot be withdrawn for amendment; but if a material defect should be discovered, there would be nothing to prevent the filing of a second adverse, complete in itself, provided the 60 days had not expired.—*Copp, 121, 155, 227; Sickel, 208.*

An Appeal Lies from the rejection of an adverse claim.—*13 L. D. 718.* In an instance where an adverse had been filed which was dismissed as defective but the adverse claimant brought his suit and filed his certificate, the land office declined to allow further action on the application until the decision of the suit.—*2 L. D. 706.*

If the adverse claim is dismissed by the local land office the adverse claimant must nevertheless bring suit within the 30 days or his rights will be gone although he sustain his contention on appeal to Washington from the dismissal of his adverse.

This manifestly wrong and unjust ruling was the final result of all possible holdings on the point, in the various branches of the Land Department, in the case of a lode called the *"No Mistake."—22 L. D. 274.* Similar ruling where the adverse was rejected. *—35 L. D. 304.*

What Claims Should Adverse.

Of course lode must adverse lode and mill site must adverse mill site and placer must adverse placer or all pretense of prior title will cease to be of avail. *—See p. 138.*

A placer must adverse a lode application; otherwise the lode will take the full area. A lode claim need not necessarily adverse a placer because it may rely on the statutory exclusion of known lodes, but it is better to file an adverse as the best means of protecting its title.*—26 L. D. 627.*

The Department held in *1 L. D. 566 (Rev. Ed. 555)* that a mill site must adverse a lode location, but to the contrary in *25 L. D. 7.* And in still later cases *(29 L. D. 522; 35 Id. 495)* it holds that an adverse is not allowed in any instance between mineral and non-mineral claimants; that a suit supporting it will not stay proceedings on an application for a mineral patent; that the question of known mineral value must be decided by the Department and that a decision of that point by a court does not conclude the Department. *Mr. Lindley, §§ 717, 724,* apparently takes the same position.

But there have been frequent instances where such adverses have been filed and sustained.*—Shafer v. Constans, 3 Mont., 369; Durgan v. Redding, 103 F. 914; Cleary v. Skiffich, 28 Colo. 362, 21 M. R. 284.* The mineral character of the land is by no means the only issue which may be involved in such suits and the procedure to obtain a mill site patent being authorized in the same act which prescribes the procedure for patenting mining claims proper, we do not perceive strength in the contention that they cannot adverse each other. Even lot owners have been allowed to adverse.*—Bonner v. Meikle, 82 F. 697;*

Young v. Goldsteen, 97 F. 303. But the later case of *Wright v. Hartville, 81 P. 649* takes the same view as the Land Office on the whole question of adverses between mineral and non-mineral claimants.

There is an evident distinction between the case of the lot owner and the mill site owner more favorable to the right of the mill site owner to adverse.

Under this unsatisfactory status of the authorities it is advisable to file both adverse and protest, as there is no certainty that the Land Office will maintain its present position as to the right of a mill site to adverse a mining application and vice versa.

Miscellaneous Rulings.

An adverse claim substantially defective may be rejected.—*3 L. O. 18; 9 L. O. 5.* But if it show the nature, boundaries and extent of the claim, the Land Office will accept it even though it do not meet all the requirements of the regulations.—*27 L. D. 358.*

The Land Office is not bound to receive an adverse claim when the filing fee is not paid or tendered.—*29 L. D. 413.*

Where there is no surface conflict an adverse filed to anticipate conflict expected *on the dip*, will not be received.—*6 L. D. 318; 29 Id. 662; Champion Co. v. Wyoming Co. 16 M. R. 145.*

An adverse based on a claim located after the publication began not containing allegations denying the validity of the prior claim adversed, will be rejected.—*7 L. O. 50; Contra, 2 L. D. 699.*

Suit in Support of Adverse.

After the adverse claim is filed, the adverse claimant must bring suit for the premises in dispute, within 30 days, under the terms of *R. S. § 2326.* *See p. 469.*

If his suit is not brought within the thirty days the adverse claimant has no standing in the Land Office except as a mere protestant; and the applicant may proceed to enter, notwithstanding the adverse. —*14 L. D. 180; 35 Id. 550.*

It has been held that failure to bring suit within the 30-day period must be specially pleaded and cannot be availed of for the first time on appeal.—*Providence Co. v. Marks, 60 P. 938.*

A suit in Nevada is commenced when complaint is filed and summons issued. The adverse claimant filed his complaint within the 30 days, but summons did not issue or at least was not placed in the Sheriff's hands until sometime thereafter. But the defendant entered a general appearance and filed a demurrer which was held a waiver of any right to object to the failure to issue summons.—*Harris v. Helena M. Co. 92 P. 1.*

The Proper Court is usually the District Court of the County where the mine is situate, except in those cases where the facts of value and citizenship are such that the U. S. Circuit Court may have jurisdiction.

It has been authoritatively held that an adverse claim suit presents no Federal question and that the U. S. Courts have no jurisdiction on that ground.—*Blackburn v. Portland Co. 175 U. S. 571; Mt. View Co. v. McFadden, 180 U. S. 533.*

Even when the courts of the United States have undoubted jurisdiction the State Court is not ousted, but the suit may be commenced in the State Court, subject to defendant's right of removal.

Proof of Commencing Suit.

After the complaint is filed a certificate should be made and signed by the clerk of the court and filed in the local Land Office in substance as follows:

JJ. CERTIFICATE OF SUIT.

STATE OF COLORADO, County of *Teller:* ss.

I, *A. W. Grant*, Clerk of the District Court of said County, do hereby certify that *Ed. F. Bishop* did on the *10th* day of *February*, A. D. *1908*, commence an action in said Court against *C. A. Wolcott*, to sustain an adverse claim against the *Bear* Lode, survey lot No. 11,310, situate in *Cripple Creek* Mineral district, *Teller* County, State of Colorado, and to recover possession of all that parcel of the

Elephant Lode, embraced within the lines of said survey lot, and that said action is now pending and undetermined in said Court.

Attest my hand and the seal of said Court at *Cripple Creek* this *10th* day of *February*, A. D. *1908*.

[SEAL OF COURT.] A. W. GRANT, Clerk.

But the failure to file this certificate is not fatal under *Rule 88*, which requires the applicant to file certificate showing affirmatively that no suit has been brought.

When a Suit Is Already Pending between the same parties for the recovery of the ground in conflict at the time of the filing of the adverse, it has been ruled that such suit may stand as the suit to support the adverse and no new suit need be brought.—*8 L. D. 437; 29 Id. 194.* In such case the plaintiff cannot dismiss so as to leave the adverse without suit supporting it.—*Axiom Co. v. Little, 61 N. W. 441.* If no adverse is filed, a pending suit will not stay patent proceedings.—*33 L. D. 187.*

The Suit in Support of an Adverse is ordinarily at law by ejectment and such suit is certainly contemplated in the statute above printed by the use of the clause "the jury shall so find." Such is undoubtedly the form of action where the plaintiff, as is usually the case, is out of possession. But where the plaintiff is already in possession he may proceed in equity by bill to quiet title. This view making the form of action depend upon whether plaintiff is in or out of possession is that which is clearly expressed by the final authority in such cases.—*Perego v. Dodge, 163 U. S. 165.*

There had been decisions holding in general terms that ejectment was the proper remedy: *Becker v. Pugh, 15 M. R. 304; Manning v. Strehlow, 11 Colo. 451; Burke v. McDonald, 13 P. 351;* and others asserting it to be an equitable action: *Doe v. Waterloo Co. 43 F. 219; Shoshone Co. v. Rutter, 87 F. 801; Providence Co. v. Burke, 57 P. 641; Mc-*

Fadden v. Mt. View Co. 97 F. 670; Butte Co. v. Barker, 89 P. 302; but the *Perego case* states the obvious test of possession as determining the form of action.

If neither party is in actual exclusive possession or if the facts render the point doubtful the claimant can treat the application as an ouster and proceed at law.—*Becker v. Pugh, 15 M. R. 304. See p. 345.*

In agreement with the *Perego case* and with these views are the cases of *Durgan v. Redding, 103 F. 914; Johnson v. Munday, 104 F. 594; Young v. Goldsteen, 97 F. 303; Book v. Justice Co. 58 F. 827.*

The cases which hold that it is an equitable action lose sight of the fact that the adverse and the suit are independent proceedings. The adverse being filed in the Land Office, the Government, the Trustee of the title—directs the contestants to adjudicate their controversy in a "court of competent jurisdiction." It then allows the winning party to report his obedience to the direction,—his success in the suit—and the patent application resumes its progress. There is no connection between the two procedures such as to bring the cause within any one of the limited schedule of the subjects of equitable jurisdiction. But if at the proper time for bringing suit the plaintiff be in possession he has the right to bring suit in equity to quiet title: the same suit which he could maintain if there were no controversy pending in the Land Office.

Parties.

The plaintiff is, of course, the adverse claimant and the defendant the applicant, but where the contestants after adverse filed conveyed to one of their number it has been held that the suit may be brought in his name alone.—*Willitt v. Baker, 133 F. 937.*

The applicant should be made a defendant, although he has sold his interest before suit brought.—*Blackburn v. Portland Co. 20 M. R. 358; 175 U. S. 571.*

The court recognizes the relation of the suit to the land office proceedings and looks to an adjudication of title not to a technical question of proper parties.—*Wolverton v. Nichols, 15 M. R. 309; 119 U. S. 485.*

Complaint.

The complaint should, of course, describe the area in conflict following the lines of plat B. in the adverse. If it declare for the whole claim it would necessitate a disclaimer as to parcel of the premises. But to the holding that the complaint is so intimately associated with the adverse claim that a failure to describe the exact area in conflict would render it fatally defective we cannot assent, though such has been the ruling in two cases.—*Cronin v. Bear Creek Co. 32 P. 204; Smith v. Imperial Co. 89 P. 510.*

KK. FORM OF COMPLAINT.

STATE OF COLORADO, County of *Teller:* ss.

In the District Court of said County.

Edward F. Bishop, Plaintiff,
v.
C. A. Wolcott, Defendant.

The plaintiff complains and alleges:

1. That on to wit: the *first* day of *January,* A. D. *1897,* and ever since hitherto he was, and is, the owner and in actual occupation of the *Elephant* Lode Mining Claim, 1500 feet in length by 300 feet in width, situate in *Cripple Creek* Mining District, County and State aforesaid.

2. That the plaintiff is, and at all times mentioned in this complaint hath been, a citizen of the United States. (*or*)

2. That at and before the date last aforesaid the plaintiff had declared his intention to become a citizen of the United States before a court of record, to wit: The Court of Common Pleas of the County of Allegheny, Commonwealth of Pennsylvania.

3. That he has and claims the legal right to occupy and possess said premises and is entitled to the possession thereof by virtue of full compliance with the local laws and rules of miners in said mining district, the laws of the United States, and of said State of Colorado, by preemption (and purchase) and by actual prior possession, as a Lode Mining Claim, located on the public domain of the United States.—*See Code, Sec. 286.*

4. That on, to wit: the *first* day of *November*, A. D. *1907*, the defendant wrongfully entered upon parcel of said claim, to wit: All that part of said claim which is intersected by the exterior lines of Survey Lot No. 11,310, known as the *Bear* Lode Mining Claim, as shown by plat marked Exhibit "B," filed on the *third* day of *February*, A. D. *1908*, in the land office of the United States, at *Pueblo*, in the said State, with the adverse claim of the plaintiff against the entry of said survey lot for patent, such ground so intersected being described as follows: (*here interference should be described by metes and bounds*) and that defendant hath ever since hitherto wrongfully withheld the possession of said parcel of said *Elephant* Lode Mining Claim from the plaintiff to his damage in the sum of one hundred dollars.

5. That said adverse claim was filed in said Land Office within the period of sixty days of publication of the notice of application for patent on said *Bear* lode and this suit is brought before the expiration of the period of thirty days after the filing of said adverse claim.

6. That this suit is brought in support of said adverse claim, and that plaintiff necessarily disbursed, expended and paid out the sum of twenty-five dollars for plats, abstracts and copies of papers filed in said land office with his said adverse claim, and also a reasonable counsel fee, to wit: fifty dollars, for the expense of preparing his said adverse claim.

Wherefore plaintiff prays judgment against the defendant:

1. For the recovery of possession of said parcel of said *Elephant* Lode Mining Claim.

2. For the sum of one hundred dollars damages.

3. For the sum of seventy-five dollars expended in support of said adverse claim.

4. For costs of suit.

D. P. Howard,
Attorney for Plaintiff

Add verification if desired; but in actions of ejectment, trespass, etc., the practice of verifying the pleadings ought to be discouraged.

The above form was expressly approved in *Jackson v. McFall (Colo.), 85 P. 638.*

Averment of Citizenship.

It is the practice to aver the citizenship of the parties in their respective pleadings. The forms above given contain such allegation, and if issue is taken on it the fact must be proved.—*Strickley v. Hill, 62 P. 894. See Citations p. 310.*

The citizenship of the parties is a material issue in an adverse claim suit.—*Matlock v. Stone, 91 S. W. 553.*

As to complaints omitting the allegations of paragraph 5 in the form above, *see pp. 310, 345.*

Costs.

Paragraph 6 of the above form is based on R. S. Colo. *1061.* The costs in such section, *strictly construed,* could not be made to include more than the expense of abstract, plat and attorney's fee. It is customary between counsel to concede without proofs that $75 has been paid under this allegation.

Complaint Detailing History of Location.

There is another style of complaint which sets forth chronologically the fact of discovery, of sinking the shaft, its depth, and what it disclosed; the placing of the location stake, the marking of the claim, and the record; following the language of the statute concerning location, etc. But many claims are sufficiently valid to maintain ejectment without a strict location, or the defendant may be in position where he is estopped from attacking weak points in the plaintiff's case. In any event such recitals lead to cumbersome pleadings and to immaterial issues, and are not the ultimate facts required to be stated in code pleading.

General allegations of title are sufficient.—*Rough v. Simmons, 15 M. R. 298; 65 Cal. 227.* But the complaint sustained in that case is the extreme of loose pleading.

Relation of the Suit to the Application.

It has, as we believe, been rightly held that an ordinary complaint in ejectment making no reference to the Land Office proceedings will support the adverse claim.—*Deeney v. Mineral Creek Co. 67 P. 724; Altoona Co. v. Integral Co. 114 Cal. 100; Upton v. Santa Rita Co. 89 P. 275.*

The suit being determined and certified copy of its Judgment Roll being filed in the Land Office showing that it was between the same parties, that it determined the right of possession to the same prop-

erty and was brought at a date found to be within 30 days of the filing of the adverse—what more is necessary to connect the two proceedings and to show that the suit was the same suit intended by the terms of *R. S. Sec. 2326?*

But departing from this obviously plain view of the proceeding the courts of the various states have scattered widely on the point as to whether at all or to what extent the pleadings should recite their relation to and connection with the defendant's application and the plaintiff's adverse. The various holdings are concisely digested in *2 Lindley, § 754.*

The forms above given are a concession to the contention that the proceedings should be tied together by formal reference to the Land Office filing and fully meet the requirements of those courts which hold such averments essential.

But while conceding as above to what is demanded by some of these decisions, and conceding as well that it is the better practice, we do not concede that a complaint ought to be held bad if they were all omitted.

In *Mattingly v. Lewisohn, 33 P. 111,* Montana held that the averment of the filing of the adverse and bringing of the suit in due time were material averments. This ruling was reaffirmed in *Thornton v. Kaufman, 88 P. 796.* But it may be inferred by implication from dates in the complaint.—*Helbert v. Tatem, 85 P. 733.*

In *Cronin v. Bear Creek Co. 32 P. 204,* Idaho held that although these dates were conceded by stipulation their absence from the complaint rendered it so defective that it would not support a judgment. Thus the patent justice of the case was sacrificed to support a technicality in Code Pleading.

But these decisions are against the current of authority.—*Pennsylvania Co. v. Bales, 70 P. 444; 22 M. R. 436; Rawlings v. Casey, 73 P. 1090; 19 Colo. App. 152; Providence Co. v. Marks (Ariz.), 60 P. 938; Quigley v. Gillett (Cal.), 35 P. 1040.*

In Arizona it has been held that the suit is "Neither an action at law nor, strictly speaking, one

in equity:" that the plaintiff must allege and prove and practically duplicate all that is required in the land office: and a complaint was held defective beyond amendment because it did not aver "that the ground in controversy was mineral land subject to location."—*Keppler v. Becker, 80 P. 334.*

We cannot see value received to any party to the contest nor any reason in practice or on principle to justify these refinements in pleading.

Amendment of Complaint.

Contrary to the ruling last above cited, *Deeney v. Mineral Creek Co. 67 P. 724* and *Woody v. Hinds, 76 P. 1,* hold that the complaint may be amended after the 30-day period has expired.

LL. ANSWER.

STATE OF COLORADO, County of *Teller:* ss.

In the District Court of said County.

Edward F. Bishop, Plaintiff,
v.
C. A. Wolcott, Defendant.

Defendant answering the complaint says:

For a first defense:

1. He denies that on the date charged in complaint or at any time the plaintiff was or is the owner or was in the occupation, actual or otherwise, of the *Elephant* Lode Mining Claim described in said complaint.

2. He admits (or denies) that the plaintiff is a citizen of the United States.

3. Defendant denies that plaintiff has or claims the legal right to occupy and possess said premises or is entitled to the possession thereof, and denies that he hath complied with the local laws or rules of miners in said *Cripple Creek* Mining District, the laws of the United States, or of said State of Colorado, in the pre-emption, discovery, or location of said so-called *Elephant* Lode Miuing Claim.

4. Defendant denies that at the time charged in paragraph four of complaint, or at any time, the defendant wrongfully entered upon the parcel of said claim described in said paragraph or any part thereof, or that he hath ever since, hitherto, or at any time, wrongfully withheld possession of said premises from the plaintiff and denies that the plaintiff is damaged in the sum of $100 or in any sum, or at all.

5. Defendant admits the allegations of paragraphs five and six of complaint.

For a second defense, defendant says:

1. That he is a citizen of the United States, and that ever since, to wit: the *first* day of *January, 1900*, he was and is the owner and in actual occupation of the *Bear* Lode Mining Claim, 1500 feet in length by 300 feet in width, situate in said *Cripple Creek* Mining District, County and State aforesaid.

2. That he has and claims the legal right to occupy and possess said *Bear* Lode Mining Claim, and is entitled to the possession thereof by virtue of full compliance with the local laws and rules of miners in said mining district, the laws of the United States and of said State of Colorado, by pre-emption (and purchase) and by actual prior possession as a lode mining claim located on the public mineral domain of the United States.

3. And that the premises sued for in said complaint are parcel of said *Bear* Lode Mining Claim, the property of this defendant.

Dewey C. Bailey, Jr.,
Attorney for Defendant.

A Replication Must Be Filed to such second defense or the defendant will be entitled to judgment.—*Newman v. Newton, 14 F. 634.* But if parties go to trial on the merits, defendant will be assumed to have waived this right.—*Quimby v. Boyd, 8 Colo. 194.*

And in Wyoming, in *Iba v. Central Ass'n, 40 P. 527; 42 P. 20*, the court took the very tenable position that the second defense was only in effect a traverse of the complaint and did not require any replication.

Plea of Abandonment and Re-Location.

In *Bryan v. McCaig, 10 Colo. 309; 15 P. 413*, the supreme court of Colorado held that an issue as to annual labor was made by general traverse of plaintiff's title in an adverse claim suit. And to like effect in Nevada, *Steel v. Gold Co. 15 M. R. 292; 18 Nev. 80*, holds that under the general allegation each party parades the validity of his own title on whatever grounds established.

If when a claim is abandoned it becomes, as it does, a part of the public domain: (*Migeon v. Montana Co. 18 M. R. 446*) Why is not an allegation, that the defendant at a date later than the abandonment entered on the public domain and discovered and located his claim, a sufficient averment of entry upon unoccupied ground?

In *Morenhaut v. Wilson, 52 Cal. 263; 1 M. R. 53,* it was ruled that while abandonment could be proved under the general issue, forfeiture must be specially pleaded. The distinction seems of no particular value, for abandonment by one party unless followed by the entry of the other to advance the abandonment to forfeiture cannot amount to a material issue,

Another line of reasoning is that forfeitures are odious; the party alleging forfeiture must prove it strictly; the presumptions are all against it, and being a special incident not necessarily associated with the party's title, it should be alleged in the complaint or answer; that is, should be specially pleaded.—*Wulff v. Manuel, 9 Mont. 286; 23 P. 723; Mattingly v. Lewisohn, 13 Mont. 508; 17 M. R. 693.*

This conflict of authority is referred to in *Johnson v. Young, 18 Colo. 629.* We cannot find that either Mr. Lindley or Mr. Snyder in their valuable text books commit themselves on this point and we are compelled to state that it remains an open question.

Abandonment is wholly immaterial if no issue (directly or indirectly) has been made upon it.—*Mattingly v. Lewisohn, supra; Coleman v. Davis, 13 Colo. 98.*

And a party who makes a relocation of an abandoned claim as such can not attack defects in its original location notice.—*Yosemite Co. v. Emerson, 28 U. S. Sup. Ct. R. 196.*

In a plea of forfeiture "labor" and "improvements" are not synonymous terms and the non-doing of the one and the non-performance of the other must be both averred.—*Power v. Sla, 20 M. R. 659; 24 Mont. 243.*

Adverse Against Void Claim, Relocated.

The Quaking Asp being a prior subsisting claim the Dog Nest was located over it, its discovery shaft within the lines of the prior claim and the location therefore void. Afterwards the prior claim (as was alleged) failed to do its annual labor and the Dog Nest filed a relocation certificate, applied for patent

and was adversed by the Quaking Asp. Held: That the relocation statute was for the benefit of defective, not void, locations and that the relocation certificate was a nullity. *Sullivan v. Sharp (Colo.), 80 P. 1054.*

The opinion everywhere has always been that a relocation perfected the original location if invalid, or, if void, the incident which rendered it void being at the time of relocation gone, it operated as an original location. The case of *Strepey v. Stark, 7 Colo. 620,* so decides in terms. The doctrine that a relocation could not cure a location originally void is absolutely novel and contrary to all the cases which have approached the point. *Beals v. Cone, 27 Colo. 473; 20 M. R. 591; Tonopah Co. v. Tonopah Co. 125 F. 390.*

The Verdict should show that the winning party is entitled to possession by virtue of making a valid location of the claim.—*Burke v. McDonald, 33 P. 49; 17 M. R. 325.* It should of course comply with all mandatory requirements of the code of the State where tried. But as it has been very rightly held that neither party is required in the adverse suit to show that he has done everything entitling to patent *(Doe v. Waterloo Co. 70 F. 456),* and the National Supreme Court upholds a general verdict for either party *(Bennett v. Harkrader, 158 U. S. 441),* it would seem that such strictness as was insisted on in *McGinnis v. Egbert, 15 M. R. 329,* and *Manning v. Strehlow, 11 Colo. 451,* ought not now to be required. A general verdict of guilty in ejectment is sufficient.—*Upton v. Santa Rita Co. 89 P. 275.*

MM. VERDICT FOR PLAINTIFF.

We, the jury, find the issues in favor of the plaintiff, and that he is the owner by discovery (or purchase) and location and has established his right to the possession and occupancy of the premises described and claimed in the complaint, to wit: *All that part of the Elephant Lode Mining Claim covered by the survey of the Bear Lode Mining Claim, Survey Lot No. 11310;* and that he, the plaintiff, is such owner and entitled to recover said premises of and from the defendant by virtue of full compliance with the statutes of the United States and of the State of Colorado

in the discovery and location of said *Elephant* Lode Mining Claim. And that he expended and should recover from the defendant the sum of seventy-five dollars expenses and counsel fee as charged for in complaint.

NN. VERDICT FOR DEFENDANT.

We, the jury, find the issues in favor of the defendant, and that he is the owner by discovery (or purchase) and location and has established his right to the possession and occupancy of the premises described and claimed in the answer, to wit: The *Bear* Lode Mining Claim, Survey Lot No. 11,310, and that he, the defendant, is such owner by virtue of full compliance with the statutes of the United States and of the State of Colorado in the discovery and location of said *Bear* Lode Mining Claim.

The above forms comply with Section 288 of the Code and with other points peculiar to an adverse suit, as suggested in said decisions of the Supreme Court of Colorado.

Rulings in Ejectment Supporting Adverse.

Declarations of a locator may be given in evidence to dispute his title.—*Harrington v. Chambers, supra; Muldoon v. Brown, 59 P. 720.* But not admissions made after he has parted with his title.—*McGinnis v. Egbert, 15 M. R. 329; 8 Colo. 41.*

A post marked as a center post may be shown in adverse suit to have been intended for a corner post.—*Sharkey v. Candiani (Or.), 85 P. 219.*

An adverse claimant may show that the location adversed is invalid by reason of the existence of a third claim in which neither party has any interest. —*Harrington v. Chambers, 1 P. 362. Affirmed, 111 U. S. 350,* but with only a general reference to this point in the last paragraph. To the contrary seems *Strepey v. Stark, 7 Colo. 614; 17 M. R. 28.* *See* EJECTMENT, *p. 345.*

The Uhlig-Lavagnino Case.

This case has been cited at pages 38 and 108; we recur to it on account of its recent review, learnedly and at length, in *Nash v. McNamara, 93 P. 405,* by the Supreme Court of Nevada. That court holds that it is not authority except in suits presenting exactly the same facts; there must have been three

successive locations, the second made while the first was still vivant, and the third made after the default of the first to perform its annual labor, with the lapse of a period longer than the statute of limitations between the making of the second and third, followed by an adverse claim suit between the second and third locations. The opinion is a labored attempt to show loyalty to federal construction, while at the same time demonstrating that that construction is not loyal to its own precedents.

Montagne v. Labay, 2 Alaska, 575, says: It is binding only "'within its own limited circle of exceptional facts," and is followed by *Dufresne v. Northern Light Co. 2 Alaska, 592*, to the same effect. We adhere to our own construction (*p. 38*) that no practical distinction can be drawn between this decision and the later and contrary holding in the Brown-Gurney case, which calls back to the original construction in the leading case of *Belk v. Meager*, where the point first arose.

Diligent Prosecution.

The Land Office cannot adjudicate upon the question whether the suit is being prosecuted with due diligence.—*22 L. D. 16; Richmond Co. v. Rose, 114 U. S. 576; 27 P. 1105.* In *Mars. v. Oro Fino Co. 7 S. Dak. 606*, the suit was dismissed for delay in securing service.

Dismissal and Reinstatement.

Jurisdiction once attached remains and where default was had, but the cause reinstated, the adverse holds, notwithstanding the certificate of no suit pending had been filed during the interval.—*1 L. D. 542; Rev. Ed. 539.* Nor will a Receiver's receipt obtained in such interval be allowed in evidence.—*McEvoy v. Hyman, 15 M. R. 300; 25 F. 539; Deeney v. Mineral Co. 67 P. 724.*

Waiver—Withdrawal or Failure to Support.

An adverse claim may be withdrawn either before or after bringing the suit thereby waiving all

rights claimed.—*4 L. D. 117; 29 L. D. 89.* Or by voluntarily dismissing the suit.—*4 L. D. 273.* And when suit is dismissed certificate to that effect must be filed. Upon failure to issue summons within the period required by the code the complaint may be dismissed.—*Steves v. Carson, 21 Colo. 280;* and a second suit cannot afterwards be brought.—*Id. 42 F. 821. See Rules 86, 87.*

The Court Trying the Adverse Suit may give full relief and if necessary restore the successful party to possession.—*Silver City Co. v. Lowry, 57 P. 11.*

Defects in the Adverse Claim are not material to the issue at law between the parties, and are for departmental consideration only.—*Rose v. Richmond Co. 17 Nev. 25; Quigley v. Gillett, 35 P. 1040.*

The practice after suit commenced is under state law and the proceedings in the Land Office are immaterial to the trial.—*Bernard v. Parmelee, 92 P. 658.*

Title in Neither Party.

That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land-office or be entitled to a patent for the ground in controversy until he shall have perfected his title.—*A. C. March 3, 1881.*

The rulings under the above Act are, that each party is practically a plaintiff, and must show his title.—*Slothower v. Hunter, 88 P. 36;* but that if neither show title the verdict must be special—which is an assertion that the title remains in the United States, so far, at least, as the litigating parties are concerned.—*Jackson v. Roby, 109 U. S. 440; Rosenthal v. Ives, 15 M. R. 324; 12 P. 904. See p. 489.*

The effect of the Act is to prevent a recovery upon possession alone in ejectment supporting adverse.—*Becker v. Pugh, 15 M. R. 304; Upton v. Santa Rita Co. 88 P. 275.*

After judgment of title in neither party the Land Office will not allow the application to be perfected. —*Newman v. Barnes, 23 L. D. 257.*

Non-Suit—Defendant's Proof of Title.

It has been held that plaintiff may be nonsuited as in an ordinary ejectment.—*Kirk v. Meldrum, 28 Colo. 459; McWilliams v. Winslow, 82 P. 538.*

But if the defendant be content with such judgment and fail to prove his own title he runs the risk of rejection of his application in the Land Office.—*28 Colo. 460.*

Plaintiff at this point is out of court and cannot demand a jury view or cross examine or otherwise attack the title of the defendant who is now proceeding *ex parte* to secure a judgment upon which to predicate his right to a patent.—*Moffatt v. Blue River Co. 80 P. 139; Connolly v. Hughes, 71 P. 681; McMillen v. Ferrum Co. 74 P. 462; Benton v. Hopkins, 74 P. 891.*

Entry of the Area Not in Dispute.

The Department has ruled that where the adverse covers only parcel of the applying claim the applicant may go to entry and patent on the area not in controversy and without waiver of any rights, defend against the contest of the adverse claimant in the suit supporting adverse.—*2 L. D. 744; 22 L. D. 343.*

Where the discovery shaft is upon the ground excluded in favor of a prior Survey, such fact does not invalidate the application where the applicant makes good his adverse for the excluded area.—*28 L. D. 321.*

Proceedings After Determination of Suit.

The Land Office requirements in such case are stated in *Rule 85.*

If the judgment is in favor of the defendant (the applicant) he files a certified copy of the judgment roll *(14 L. D. 308)*, and is allowed to pay for and en-

ter the claim or so much thereof as has been awarded to him.

If the judgment is in favor of the adversing party, he files certified copy of the judgment roll, and must obtain and file plat and survey, and file full set of final entry papers; in fact, he must perform whatever is required of an applicant, except, of course, the posting and publication.

The adverse claimant in such proceeding enters only the area in conflict recovered by his judgment. —*27 L. D. 375.* If he desires to patent his full claim he must apply in all respects, including posting and publication, as an original applicant.

In such case where he has already begun his application and excluded defendant's prior survey, the judgment roll shows him entitled to and he is allowed to enter such ground, although originally excluded. If he does not begin his application until after he has obtained judgment, his application will include the areas formerly in conflict.

Where the suit is compromised, if there is only one adverse, it is more convenient to dismiss the suit, taking deed or bond for deed from the applicant. In such case, upon filing certificate of dismissal, the original survey goes to patent without further complications, and the defendant can convey after entry according to the terms of settlement.

But in all this class of cases, and especially where there are two or more adverses, legal counsel should be taken. A settlement between the applicant and one adversor cannot bind a second adversor; there may be questions of retaining end lines, or the discovery shaft, or patent improvements; and it may be very material as affecting extralateral rights or on the issue of priority, as to which lode had best take the patented title.

An adjudication of priority in favor of part of a lode seems to be an adjudication of priority on the questions arising in any later form of controversy between the same lodes.—*Last Chance v. Tyler Co. 157 U. S. 683; Bunker Hill Co. v. Empire Co. 109 F.*

538; 114 F. 420. But see *U. S. M. Co. v. Lawson* as cited *ante, p. 143.*

Annual Labor Pending the Trial.

In the matter of the *Marburg Lode, 30 L. D. 202,* the department held that where entry has been stayed by the operation of a protest or adverse, a delay not chargeable to the applicant, the annual labor need not be kept up. That it will not recognize as protestant a relocation made during such interval, based on non-performance of labor. If such be the correct ruling we cannot see why it should not also apply to the adversing claim. Questions of procedure in the Land Office are for that office to decide. Construction of statutes defining conditions of title are for the courts. The question is so nearly one of the latter class that in the absence of judicial decision to the same effect it is wholly unsafe to neglect the annual labor in reliance on this case.—*See Rule 55; 31 L. D. 69.*

In *Willitt v. Baker, 133 F. 937,* the peculiar ruling was made that both plaintiff and defendant must show that they had respectively performed their annual labor during the preceding year.

Agreement to Not Adverse.

When contesting claimants agree with the applicants to file no adverse in consideration of the applicants undertaking to convey the title to the ground in conflict or some other interest in the claim when entry is made or patent issues—such agreement should be formally reduced to writing under signature and seal. Such a contract is not against public policy and will be enforced.—*St. Louis Co. v. Montana Co. 171 U. S. 650.* In *Ducie v. Ford, 138 U. S. 587,* a case of this kind but the contract verbal, it was held to be within the Statute of Frauds, *i. e.*, a contract void unless written, and the plaintiff went without relief. The decision, however, is largely based on asserted defects in the pleadings and can hardly be considered as holding that so gross an instance of wrong would be in all cases shielded by that statute.

PROTEST.

The office of a protest is to show that no patent, such as applied for, should issue—as where a mill site patent is asked for on mineral ground.

Or that it should not issue to the particular applicant by reason of some defect of person, as that the applicant is an alien corporation; or for failure to comply with the practice of the department in some serious particular. It is not safe to rely on the presumption that the Land Office will of its own motion observe every departure from its own rules.

The protestant can never by his protest acquire title. He can at most defeat the efforts of the applicant. But if the protest be sustained and the applicant be compelled to begin *de novo*, as for instance where the irregularity pointed out to the department is a short publication and he is required to go back to that point and republish—upon the new proceedings or the republication the protestant has the opportunity to file his adverse claim. Any stranger to the original application would have the same right.—*23 L. D. 395.*

The fact that the protestant is or claims to be the real owner, or to have the better title, has its place in an adverse and is not a ground of protest.—*22 L. D. 624;* but it should be averred to give standing to the protestant.

A protestant claiming an interest is allowed the right of appeal.—*8 L. D. 122; 16 Id. 532; 29 Id. 230.* But if he has no such interest he is regarded as a mere *amicus curiae* and has no such right.—*8 L. D. 439.* A party having no surface conflict is not such a party in interest as to have the right to appeal.—*6 L. D. 318; 19 Id. 356.* Nor has a party whose only claim is by location made after the protest was filed. —*19 L. D. 356.*

The department will entertain a protest as provided in R. S. Sec. 2325, showing that "the applicant has failed to comply with the terms of this chapter" —that is, has made a substantially irregular step in

his location or in his proceedings to obtain patent, as for instance that he has not disclosed mineral in his discovery shaft or elsewhere within the lines of the claim *(2 L. D. 743; 17 Id. 112; 27 Id. 396)*, or that the publication was defective, the $500 improvements not made *(19 L. D. 356; 27 Id. 396)*, or any other serious want of conformity to the law or to the Land Office regulations.—*16 L. D. 532.*

But the fact that the discovery is not upon the public domain because upon location of the protestant's of alleged earlier date and other like points, which if availed of by adverse would have shown better title in the protestant, will not be considered as grounds of protest.—*22 L. D. 624; 27 Id. 191; 26 Id. 580; 30 Id. 67.*

The Test Between the Two Classes of Cases Is: That where a defect exists which is a matter of public interest, and which shows that the applicant has not proceeded regularly as to the United States or as to the entire body of prospectors who are entitled to see that all are required to proceed under like restrictions, a protest will be considered; but where the point is one of interest only as between the applicant and the protestant, or as between the applicant and a third party who is not complaining (*21 L. D. 30; Mod. on Review, Id. 544*), the protestant cannot by his protest claim the right to litigate in this form what he should have contested by adverse.

FORM OF PROTEST.

In the matter of the Application of *The Anaconda Mining Company* for patent on the *Martha Becker* Mill Site. Survey Lot No. 930 B. *Pueblo* Land Office, Colorado.

*To the Register and Receiver of said United States Land Office:

Your protestant, *C. H. Aldrich*, whose postoffice address is *Chicago, Illinois*, a citizen of the United States over the age of twenty-one years, hereby respectfully protests against the entry by, and issuance of patent to, *The Anaconda Mining Company*, on their so-called mill site styled

*In the General Land Office the address is "To The Honorable the Commissioner of the General Land Office." In the Department "To The Honorable the Secretary of the Interior."

the *Martha Becker* Mill Site, Survey Lot No. 930 B, situate in *Cripple Creek* Mining District, County of *Teller*, State of Colorado. Because:

1. The said so-called mill site is not and never was used or occupied in connection with the said *Martha Becker* Lode for mining or milling purposes.

2. It is not and never was used or occupied by the applicant or its grantors in connection with any lode or by itself for mining or milling purposes.

3. There are no improvements and never have been any improvements upon said mill site except the improvements made by your protestant.

4. The said mill site is below the mill and below the tailrace of the mill of the said applicant company and has never been and is not now parcel of nor appurtenant to said mill, nor included within the mill site on which said mill stands.

5. Said so-called mill site or a great part thereof, the conflicting area being shown by the plat hereto attached duly certified (*see p. 472*), was in good faith located as the Lion Mill Site by your protestant in the year *1897* and long prior to the said application and is now being used for mining purposes in connection with the *Lion* Lode, lying immediately above the said mill site, owned and being worked by your protestant.

(6, etc.; 7, etc.) Add or substitute other reasons according to the facts, *e. g.*—the publication was not posted on the Land Office Bulletin during the period of newspaper publication—the location of said mill site is on mineral land and land more valuable for mineral than for mill site purposes—etc.

Wherefore for these causes as verified by the affidavit of your protestant attached hereto, and as well for the want of proper proof that the said so-called *Martha Becker* Mill Site is being "used or occupied by the proprietor of the said *Martha Becker* Lode for mining or milling purposes," as required by the terms of section 2337 of the Revised Statutes of the United States, and that the applicant has otherwise failed to comply with the terms of Chapter 6 of Title XXXII of said Revised Statutes, entitled "Mineral Lands and Mining Resources," your petitioner protests as aforesaid.

P. J. DUGAN, *Pueblo.* C. H. ALDRICH.
Attorney for Protestant.

STATE OF COLORADO, County of *Teller:* ss.

Before me, the subscriber, *E. H. Gruber*, a Notary Public in and for said County, personally appeared *C. H. Aldrich*, who, being duly sworn, saith that he is the protestant named in the foregoing protest subscribed by him; that he has read the same and knows the contents thereof, and that the same and the matters and things therein stated are true. C. H. ALDRICH.

Sworn and subscribed before me this *10th* day of *January*, A. D. *1908*. *E. H. Gruber*,
[SEAL.] Notary Public.

TIDE LANDS.

Minerals lying beween high and low tide, as well as under the sea, in a Territory, belong to the National government, but they are not considered part of the public domain open to the settler or occupant under any form of entry. Upon admission of the Territory this sovereignty passes to the State Government.—*29 L. D. 396; Shively v. Bowlby, 152 U. S. 1.*

The boring for oil may be enjoined at the suit of the frontage owner as an invasion of his right of access to the ocean.—*San Francisco Union v. R. G. R. Co. 77 P. 823.*

By the Alaska Act (*p. 501*) the tide lands of Bering Sea are opened to exploration and mining to wit: the lands between high and low tide, under miners' rules, and the lands below low tide under rules to be prescribed by the Secretary of War. Such latter rules are limited to "the preservation of order and the protection of the interest of commerce" and we see no reason why the rules generally of a district on the beach should not extend to ground below the tide on all points not covered by the Secretary's rules.

The Act contemplates only the temporary working of this class of claims, not providing for patent to issue at any period. Except as to patenting, the U. S. Mining Acts are extended to them, so far as applicable, but the mining districts are especially empowered to make rules as to record, and impliedly as to notice, staking, size of placer claims, labor, representation and all other points not controlled by the Acts of Congress. This doubtless includes the right to restrain or control the location and representation of claims by agency.

At other points, on shore of either State or Territory, mining by the first occupant is a trespass as against the Government, but no third party has the right to complain.

The rights of parties mining on such premises depend on priority of possession, and those rules of law which govern that class of cases where the real owner is not asserting his title but allows to third parties the present enjoyment of the use, by sufferance.

ALASKA.

The following are the clauses of the Alaska Act of June 6, 1900, 31 Stat. L. 321, material to mining claimants. All the special clauses as to aliens were rejected, and the status of mining titles is left the same as in other States and Territories where there are few or no statutory prescriptions, the Act evidently contemplating control by district rules when necessary or desired by the miners to supplement the general terms of the mining Acts.

Section 13, Title I, provides for the division of the Territory into three "recording divisions," the bounds of which were fixed by an act approved June 13, 1902.—*32 St. L. 385.*

The first division includes all the territory East of the 141st degree of Longitude.

The second includes all territory W., N. W. and N. of a line commencing at mouth of Colville River; follow up the river to where it crosses the 154th meridian line the second time; follow said meridian S. to west side of Tohtankella Mtn. and the Yukon River; thence southeasterly to western side of Mt. McKinley; thence southwesterly to most northern point of Lake Clark; thence along N. W. side of Lake Clark to the 60th degree latitude; thence West along said degree to Kuskokwim Bay, including the mainland West of said Bay and all islands N. of 59th degree.

The third division includes the rest of the Territory.

These are to be subdivided into "recording districts," and for each district a recorder has been or is to be appointed.

The clerk of the court is *ex officio* recorder of all that part of any recording division not set off into recording districts.

Record of Claims.

Sec. 15.— * * * Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject-matter is situated.

District Rules—Old Records.

Sec. 16.— * * * Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this Act or the general laws of the United States; and nothing in this Act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: *Provided further*, All records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this Act.

Mining Acts Extended—Tide Lands and Sub-Sea Minerals.

Sec. 26.—The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the district of Alaska; *Provided*, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized min-

ing districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law; *Provided further,* That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide, under the tenth section of the Act of May fourteenth, eighteen hundred and ninety-eight, entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," shall not apply to mineral lands or town sites.—*Approved June 6, 1900.*

Proof of Annual Labor.

That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvements, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or

owner of any such claim to comply with the provisions of this Act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.—*Sec. 1, Mar. 2, 1907. 34 St. L. 1243.*

The last section above printed provides especially for proof of annual labor. In Section 15 there is a clause allowing the record of "Notice and declaration of water rights" and the obvious intent of the act is that all details of location not inconsistent with the U. S. Mining Acts are left to the regulation of organized mining districts.

The coal land laws are extended to embrace Alaska by A. C. June 6, 1900.—*31 St. L. 658.*

A special Act for location and patenting of coal lands in Alaska was approved April 28, 1904.—*33 St. L. 525; 33 L. D. 114.*

Titles Prior to 1900.

From 1884 to 1900 (*23 St. L. 24*) the Laws of Oregon so far as they covered the subject were in force. Those statutes only required a location notice and record and forbade more than one location by the same person on the same lode. The universal terms of Sec. 2324 of course applied. And all possessory claims prior to the Act of 1884 were validated by the Act of that year.—*Bennett v. Harkrader, 158 U. S. 443.*

PHILIPPINE ISLANDS.

An extremely detailed and complicated mining code for the Philippines is contained in the Act of July 1, 1902, providing a temporary government for those islands.—*32 St. L. 697.* Materially amended Feb. 6, 1905.—*33 St. L. 692.*

TEXT OF U. S. STATUTES REPEALED.

Sections of Act of July 26, 1866, Repealed by Act of May 10, 1872, and Not Found in the Revised Statutes.

Original License to Explore.

Sec. 1.—That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

Improvements—Dip—Patent.

Sec. 2.—That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

Application for Patent.

Sec. 3.—That upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the prem-

ises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

Form of Survey—Length of Claim.

Sec. 4.—That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid, and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners: *Provided*, That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.—*See pages 12, 15.*

Adverse Claims.

Sec. 6.—That whenever any adverse claimants to any mine located and claimed as aforesaid shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until a final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases.—*14 St. L. 251.*

FULL TEXT OF UNITED STATES LAWS NOW IN FORCE.

The text is taken from the last edition "Revised Statutes of the United States," and the Supplement and Statutes at Large to the Second Session of 59th Congress, 1907. This revision includes the unrepealed sections of

An act granting the right of way to ditch and canal owners over the public lands, and for other purposes.—*Approved July 26, 1866.*

An Act to amend an Act granting the right of way to ditch and canal owners over the public lands, and for other purposes.—*Approved July 9, 1870.*

An act to promote the development of the mining resources of the United States.—*Approved May 10, 1872.*

Commonly called the "Mining Acts," with all their amendments, and miscellaneous sections from other Acts.

The sections of the Act of 1866, repealed by the Act of *1872*, are printed, *ante p. 504.*

TITLE XIII, CHAPTER SEVENTEEN.

Possessory Actions.

Sec. 910.—No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.—*Sec. 9, Feb. 27, 1865. See p. 7.*

TITLE XXXII, CHAPTER SIX.

ENTITLED "MINERAL LANDS AND MINING RESOURCES."

Reserved from Sale Under the Pre-Emption Acts.

Sec. 2318.—In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.—*Sec. 5, July 4, 1866.*

General License.

Sec. 2319.—All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed,

NOTE.—Each Statute, State or Federal, printed in this book, has been compared with the official original publication so as to have its exact wording and punctuation.

are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.—*Sec. 1, May 10, 1872.* *See p. 8.*

District Rules.

Length of Claims.

Sec. 2320.—Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other.—*Sec. 2, May 10, 1872.* *See pp. 15, 18.*

Discovery Essential. Width of Claims.

Proof of Citizenship.

Sec. 2321.—Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.—*Sec. 7, May 10, 1872.* *See p. 436.*

Citizenship of Corporations.

Surface—Dip and Side Veins.

Sec. 2322.—The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as

they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.—*Sec. 3, May 10, 1872. See pp. 157, 167.*

Top or Apex Controls.

Surface.

Tunnels.

Sec. 2323.—Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.—*Sec. 4, May 10, 1872. See p. 249.*

District Rules.

Sec. 2324.—The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to

Location, Record.

some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the *tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. —*Sec. 5, May 10, 1872. See pp. 69, 94, 115.*

Annual Labor.

Forfeiture.

Amendment of 1875—Labor by Tunnel.

That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.— *Sec. 1, Feb. 11, 1875. Sup. 62. See p. 257.*

Amendment of 1880—Annual Labor Period Fixed.

That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by

*Instead of June 10, 1874, the date ultimately fixed was January 1, 1875. *See note, p. 94.*

adding the following words: *"Provided,* That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."—*Sec. 2, January 22, 1880. Sup. 276.* *See p. 95.*

Application For Patent.

Sec. 2325.—A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant

60 Days' Publication.

$500 Improvements.

Adverse Claim.

is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.—*Sec. 6, May 10, 1872.* *See* APPLICATION FOR PATENT, *p. 418.*

$5 per Acre.

Application by Non-Residents.

That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided*, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits:

And provided, That this section shall apply to all applications now pending for patents to mineral lands."—*Sec. 1, January 22, 1880. Sup. 276.* *See p. 449.*

Adverse Claims.

Sec. 2326.—Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land-Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to

Suit Supporting in 30 Days.

Proceedings After Judgment.

rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land-Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever.—*Sec. 7, May 10, 1872. See p. 468.*

Title in Neither Party.

That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land-office, or be entitled to a patent for the ground in controversy until he shall have perfected his title.—*March 3, 1881. Sup. p. 324.*

Adverse by Agent for Non-Residents.

That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly-authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.—*Sec. 1, April 26, 1882. Sup. p. 338.*

Affidavits Out of Land District.

That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record or before any notary public of any State or Territory.—*Sec. 2, Id.*

Survey Amendment of 1904.

*"Sec. 2327.—The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey,

Section 2327 Prior to Amendment.

*Sec. 2327.—The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but

but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give away thereto."—*April 28, 1904. 33 St. L. 545.*

Previous Applications.

Sec. 2328.—Applications for patents for mining-claims under former laws now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.—*Sec. 9, May 10, 1872.* *See p. 156.*

Adverse Rights Excepted.

Placers Open to Entry.

Sec. 2329.—Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.—*Sec. 12, July 9, 1870.* *See p. 208.*

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need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.—*Sec. 8, May 10, 1872.*

Oil Placer Act.

That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this Act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.—*Feb. 11, 1897. 29 St. L. 526. See p. 211.*

Annual Labor on Oil Claims—*see p. 115.*

Saline Placer Act.

That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: *Provided*, That the same person shall not locate or enter more than one claim hereunder.—*Jan. 31, 1901. 31 St. L. 745. See p. 212.*

Legal Subdivision of Placers.

Sec. 2330.—Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona-fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona-fide settler to any purchaser.—*Sec. 12, July 9, 1870. See p. 209.*

160 Acre Placers.

Placers on Surveyed Lands.

Sec. 2331.—Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular sub-divisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral

land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.—*Sec. 10, May 10, 1872. See p. 209.*

Limitations.

Sec. 2332.—Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent.—*Sec. 13, July 9, 1870. See pp. 260, 373.*

Liens.

Placer Claim Containing Lode.

Sec. 2333.—Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.—*Sec. 11, May 10, 1872. See p. 222.*

Placers $2.50 per Acre.

Deputy Surveyor and Fees.

Sec. 2334.—The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of

vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land-Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land-district where mines are situated for the publication of mining-notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and receiver of the land-office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land-Office.—*Sec. 12, May 10, 1872.* *See p. 400.*

Charges for Publication.

Affidavits and Proofs.

Sec. 2335.—All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given.—*Sec. 13, May 10, 1872.* *See p. 401.*

Agricultural Contest.

Cross Veins.

Sec. 2336.—Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.—*Sec. 14, May 10, 1872.* *See pp. 150, 154.*

Veins Uniting on the Dip.

Mill Sites.

Sec. 2337.—Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.—*Sec. 15, May 10, 1872.* *See p. 234.*

Easements.

Sec. 2338.—As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development, and those conditions shall be fully expressed in the patent.—*Sec. 5, July 26, 1866.* *See p. 202.*

Water Rights—Appropriation.

Sec. 2339.—Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.—*Sec. 9, July 26, 1866.* *See p. 193.*

Patents Subject to Water Easements.

Sec. 2340.—All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-right, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.—*Sec. 17, July 9, 1870.* *See. p. 193.*

Homesteads.

Sec. 2341.—Wherever, upon lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "HOMESTEADS."—*Sec. 10, July 26, 1866.*

Segregation of Agricultural Lands.

Sec. 2342.—Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.—*Sec. 11, July 26, 1866.*

Land Districts.

Sec. 2343.—The President is authorized to establish additional land-districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.—*Sec. 7, July 26, 1866.*

Vested Rights.

Sec. 2344.—Saving Clause as to Sutro Tunnel Act.

Sec. 2345.—Excepts Michigan, Wisconsin and Minnesota.*

State and Railroad Grants.

Sec. 2346.—No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grants.—*Res. No. 10, January 30, 1865.*

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*By Act of May 5, 1876, *Sup.* 104, Missouri and Kansas are excepted from the operation of the Mining Act. By Act of March 3, 1883, *Sup.* 404, Alabama is excepted.

Rights of Canadians in Alaska.

Sec. 13.—That native-born citizens of the Dominion of Canada shall be accorded in said District of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in said District of Alaska; and the Secretary of the Interior shall from time to time, promulgate and enforce rules and regulations to carry this provision into effect.—*Approved May 14, 1898. 30 St. L. 415. See Rule 112, p. 404.*

By act of May 21, 1896, the right of way for oil pipe lines in Colorado and Wyoming is granted.

When a military reservation is vacated the mineral lands become part of the public domain.—A. C. July 5, 1884, Sup. 455.

COAL LANDS.

Legal Subdivisions.

Sec. 2347.—Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such land, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.—*Sec. 1, March 3, 1873.*

160 or 320 Acres $10 to $20 per Acre.

Settlers Preferred.

Sec. 2348.—Any person or association of persons severally qualified, as above provided, who have opened and improved or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual

possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements. —*Sec. 2, Id.*

640 Acre Tracts.

Land Office Proceedings.

Sec. 2349.—All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.—*Sec. 3, Id.*

Entry Limited.

Sec. 2350.—The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.—*Sec. 4, Id.*

Conflicting Claims.

Sec. 2351.—In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the prefer-

ence-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land-Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections. —*Sec. 5, Id.*

Vested Rights—Lodes and Placers Excepted.

Sec. 2352.—Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.—*Sec. 6, Id.*

The proceedings to enter coal lands under the above sections are regulated by Circulars of the General Land Office of April 12 and 24, 1907.—*35 L. D. 665, 681.* A special survey of township containing coal lands is provided for by *28 St. L. 423.*

The provisions of the Act extended to Alaska, *31 St. L. 658.*

TIMBER AND STONE ACT.

Lands Chiefly Valuable for Timber or Stone.

That surveyed public lands of the United States within the *public land States,* not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands.

Mining Claims Excepted.

Provided, That nothing herein contained shall defeat or impair any bona-fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona-fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes. (A further proviso follows saving ditch and water rights.)

Duplicate Statements Required.

Sec. 2.—That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land-office within the district where the land is situated.*

Sale to Bona Fide Purchaser.

And if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, shall be null and void.

Publication and Posting.

Sec. 3.—That upon the filing of said statement, as provided in the second section of this act, the register of the land office, shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein

*An Act of 1904, 33 St. L. 59, makes special provision for verification of the forms under the Act and making proofs outside the Land District.

required: secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase-money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon.

Protest and Appeal.

Provided, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land-office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

The original Act was confined to certain States, and the above Act is the law as it now reads extended to all "Public Land" States.—*1 Sup. 167; 2 Sup. 65. See p. 213.* Unsurveyed lands cannot be entered under this Act.

The entire procedure consists of (1) filing duplicate statements as prescribed by the second section above printed; (2) advertisement and posting for sixty days as required by the third section, and, (3), at the completion of the sixty days file the proof of publication and make proof by two witnesses, who appear in person at the Land Office, that the land is of the character in detail as described in the above first section—whereupon immediately follow payment and entry.

The meaning of the phrase in section 2 "That he does not apply to purchase the same on speculation," is construed in *U. S. v. Budd, 144 U. S. 154; U. S. v. Detroit L. Co. 200 U. S. 521; Hawley v. Diller, 178 U. S. 476.*

An entry made in good faith, though with the expectation of profiting by a sale of the land, is not a "speculation."—*32 L. D. 349.*

The purchase money may be borrowed and secured by mortgage on the land.—*34 L. D. 133.* But no mortgage or conveyance should be made before entry and payment as the Department may require a non-alienation affidavit at any time before receiver's receipt issues.

In a contest betwen a timber entry and an agricultural claim the former must show that the land, as a whole, is substantially unfit for cultivation.—*35 L. D. 498.*

The fact that the land will be fit for cultivation after the timber is removed does not exclude it from entry under the timber act.—*U. S. v. Budd, 144 U. S. 154; Thayer v. Spratt, 189 U. S. 346.*

Failure of the applicant to personally examine the land sought to be entered, is fatal to the application.—*32 L. D. 606, 631.*

TIMBER ACT.

Timber Free to Miners.

That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona-fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided,* the provisions of this act shall not extend to railroad corporations.—*June 3, 1878. Sup. p. 166.*

The above is the Act now in force. The Acts of 1871 and 1873, *26 St. L. 1093; 27 Id. 444,* are a repetition of its provisions as to certain States and territories. The Acts are construed by circulars found in *29 L. D. 571, 572.*

These circulars contain the "regulations" mentioned in the act which are material, because the burden of proof is on the timber cutter to show compliance with them.—*U. S. v. Basic Co. 121 F. 504.* The same case gives a liberal construction to the term "mineral lands."

Under the Act above printed timber may be cut on mineral lands for purposes of sale or for roasting ores—nor can the Secretary by regulation prohibit cutting for such purposes.—*U. S. v. Rossi, 133 F. 380; U. S. v. United Verde Co. 196 U. S. 207.*

Using timber for smelting purposes is within the terms of the Act of 1891.—*34 L. D. 78.* Also for constructing electric light plants, bridges and flumes by city or county.—*Id. 112.*

Proof of panning colors is not enough to prove that the land is mineral so as to justify timber cutting.—*Anderson v. U. S. 152 F. 87.* A purchaser of timber cut by trespass cannot defend on his good faith. He cannot have a better title than his vendor. —*Id.*

See Building Stone Act, *p. 209.*

Alaska.

Section 11, Act of 1898, *30 St. L. 414*, allows free use of timber to miners in Alaska.

GLOSSARY OF MINING TERMS.

ACEQUIA. A ditch. *Spanish.*

ADIT. A horizontal drift or other passage used as an opening or drain to a mine; applied to no level except one opening on the surface. *Latin.*

ADVENTURER. A shareholder.

ALLUVIUM. The sediment of streams and floods. *Latin.*

AMALGAM. The mechanical combination of quicksilver with gold or silver.

ANDESITE. A dark porphyritic lava, composed of black crystals imbedded in a mass of light colored feldspar. ANDESITE BRECCIA. Fragmental andesite united into a compact rock by silica and other natural cementing materials. The main eruptive rock of the Cripple Creek district. ANDESITE TUFF. Andesite in minute fragments, finer than breccia. *John Wellington Finch.*

APEX. The top of a lode. *Latin.*

ARASTRA. A circular mill for grinding quartz by trituration between stones attached looseiy to cross arms. *Spanish.*

ARCH. A part of the gangue left standing for support.

ARGENTIFEROUS. Silver bearing. *Latin.*

ASCENSION THEORY. That referring the filling of fissures to matter from below. *Von Cotta, 71.*

ASPHALT. A solid form of native bitumen, which occurs more or less pure, or mixed with inorganic or other adventitious non-bituminous matter. The name is also applied, commercially and in engineering pariance, to materials in general containing this form of native bitumen or any form resembling it. See BITUMEN. *C. O. Baxter.*

ASSAY. A test of the mineral contained in a larger mass by extracting and weighing the product of a sample. *See p. 376.*

ASSESSMENT WORK. The annual labor ($100) required to hold a claim. *See p. 94.*

AURIFEROUS. Gold bearing. *Latin.*

BACK. The roof of a drift, stope or other working.

BAL. A mine. *Cornish.*

BANK. The surface at the pit's mouth.

BANKET. Term applied to the ore of the Rand Reefs.

BANKSMAN. The man at the shaft-mouth who handles the bucket. *Cornish.*

BAR DIGGINGS. Gold washing on river bars.

BARRIERS. Masses of unworked gangue or coal left to prevent drainage from mine to mine.

BASE BULLION. Pig lead containing its gold and silver unseparated.

BASE METALS. All metals except gold, silver, mercury and the platinum group, which are termed noble metals.

BED. A horizontal seam or deposit of ore.

BED ROCK. The solid rock outcropping at surface or underlying the gravel, slide or other loose earth.

BISMUTH. A brittle crystalline grayish white metal very easily fusible. Found as an oxide or sulphide in ores of gold, silver, copper and other metals. Not usually distinguishable except by assay. As distributed with such ores, has no commercial value unless of high percentage. *Frank M. Taylor.*

BITUMEN consists of a mixture of native hydrocarbons and their derivatives, which may be gaseous, liquid, a viscous liquid or a solid, but, if a solid, melting more or less readily on the application of heat, and soluble in turpentine, chloroform, bisulphide of carbon, similar solvents and in the maltha or heavy asphaltic oils. Natural gas, petroleum, maltha, asphalt, grahamite, gilsonite, ozokerite, etc., are bitumens. See ASPHALT. *C. O. Baxter.*

BLACK JACK. A dark variety of zink blende.

BLENDE. A sulphide of zink.

BLOSSOM. Decomposed out-crop of a vein. Gossan. Iron hat.

BLOW-OUT. A spreading out-crop.

BONANZA. Fair weather at sea; a large body of paying ore. Became a familiar term upon the opening of the immense ore bodies in the Comstock. *Sp.*

BOOM DITCH. The ditch from the dam used in booming. (2) A slight channel cut down a declivity into which is let a sudden head of water intended to cut to bed-rock and prospect for the apex of any underlying lode.

BOOMING. A kind of placer mining where the water is accumulated in a dam and let out at intervals, so as to utilize its cutting power in the form of a torrent.

BORRASCA. The reverse of Bonanza. Out of pay.

BOULDER. A large, loose, rounded stone.

BRATTICE. A bulkhead.

BREAST. The heading of a drift, tunnel, or other horizontal working.

BRECCIA. A conglomerate of angular fragments.

BRITTLE SILVER. Stephanite. A sulphide of antimony and silver containing 68.5 per cent. silver with the antimony variable. Sometimes contains iron, copper and arsenic; variable in color, hardness and specific gravity. *B. B. Lawrence.*

BROACHING. Trimming or straightening a working.

BRONZE. An alloy of copper and tin. Brass is an alloy of copper and zink.

BUDDLING. Separating ores by washing.

BULLION. Uncoined gold or silver.

CACHE. A place where a prospector's provisions or outfit is buried or hidden. *French.*

CALAMINE. An ore of zink. *Lapis Calaminaris.*

CALAVERITE. A telluride of gold, containing 55.5 per cent. tellurium and 44.5 per cent. gold; allied to and commonly misdescribed as sylvanite; sometimes distinguishable from the latter by a yellow color and lack of crystallization. *J. W. Finch.*

CANON. A narrow valley. Termed Box Canon when the sides are perpendicular. *Spanish.*

CAP. Space where the walls contract so as to leave only a trace of the vein. A pinch. (2) A space in the vein where the gangue becomes barren.

CARBONATES. The combination of carbonic acid with bases. Soft carbonates have lead for a base. Hard carbonates have iron for a base. An ore of lead and silver.

CEMENT. Gold-bearing gravel united and hardened into a compact mass.

CHEEK. The side or wall of a vein.

CHIMNEY. A pocket or ore body when found pipe shape, with general perpendicular position.

CHLORIDES. Compounds of chlorine with other elements.

CHUTE. (or SHOOT.) A flume for sliding ore. (2) A chimney of ore. *French.*

CINNABAR. Sulphide of mercury.

CLAIM. A location. The amount of ground which may be located by a single person or association. *See p. 461.*

CLEAN-UP. The operation of collecting the gold which has settled in the flume of a placer or in an arastra.

CLEAVAGE. The property of splitting more or less readily in certain definite directions.

COASTER. One who picks dump, or gleans in abandoned mines for ore in sight.

COBBING. Ore sorting.

COLLAR. The top of a shaft or winze. (2) The timbering of a shaft when carried above the surrounding surface.

COLOR. A particle of gold in the pan.

CONCENTRATION. The removal by mechanical means of ore from the gangue or slime.

CONTACT. The plane of meeting of two formations.

CONTACT VEIN. A vein along the plane of contact of two dissimilar formations, consequently separating the two formations. *Von Cotta, 28.*

COPPER. A metallic element. Red, hard, sonorous, ductile, malleable, non-magnetic, notable as best available conductor of electric current. Name derived from island of Cyprus.

COST-BOOK COMPANY. A system of mining partnership local to Cornwall and Devon.

COUNTRY ROCK. The rock beyond the walls of a lode. The strata between or across which the lode is found.

COURSE OF VEIN. Its strike. The horizontal line on which it cuts the country rock.

COYOTING. Spasmodic, irregular, surface mining.

CRADLE. A rocker. A short trough for washing gold.

CRIBBING. The timber lining of a drift, shaft, winze or mill-hole. The term also is applied to rough or light timbering as distinguished from solid set work.

CROSS COURSE. An intersecting vein.

CROSS CUT. A level driven across the course of a vein. A short tunnel.

CUBIC EQUIVALENTS.—The following table gives the equivalent in cubic feet of a ton of the ordinary ores and their gangues to be used to calculate ore in sight, displacements, etc.:

	Cubic Feet.
One ton of water (the unit) equals.....	32.03
Galena	4.39
Iron Pyrite	6.68
Copper Pyrites (yellow).....	7.67
Lead Carbonate (cerrusite).....	4.96
Zink Blende	8.02
Silicious Gangue	11 to 16
Silica (White Quartz).....	11 to 13
Granite or Gneiss, about.....	12

The above figures are for rock and ore in place. When broken they occupy about one-fourth greater space. When the specific gravity is known divide 32.03 by the figure denoting the specific gravity, and the result is the cubic contents of a ton of the material. The specific gravity of sulphur is 2.05. (32.03÷2.05=15.62 cubic feet.)

Arthur Howe Carpenter.

CUT. To intersect a vein.

CYANIDE. A compound of cyanogen with a metal. The Cyanide Process of gold extraction is performed by passing an auriferous solution of potassium cyanide over zink shavings, by which the values are precipitated. *Henry Lewis on Gold Mining. Thomas R. Beaumont.*

DEAD WORK. The developing of a mine preparatory to stoping. *See p. 284.*

DEBRIS. The loose fragments detached from the bed rock and washed down, to which the term slide is more appropriate; waste rock of any kind. *French.*

DEEP. The lower portion of a vein.

DENOUNCEMENT. The Mexican or Spanish equivalent to "location and record" of a claim.

DESCENSION THEORY. The theory that veins were filled from above.

DIGGINGS. Placers. *Amer.*

DIKE. A fissure made and filled by plutonic action. Its rock is most commonly porphyry. It is often barren, but in some cases mineralized; or may carry a mineralized selvage and so appear as the wall of a lode.

DILUVIUM. A deposit of loose boulders, earth, etc., attributed, geologically, to deposition from water.

DIP. The line of declination of strata. *Bainbridge. Yale*—The angle which a lode makes with the plane of the horizon. *Von Cotta, 26.* The departure of a vein from the perpendicular or from the horizontal.

DITCH. An artificial water course, flume or canal.

DIVINING ROD. A stick of witch hazel or other like device used in prospecting for lodes. *Law v. Grant, 7 M. R. 57; 37 Wis. 548.*

DOLLAR. From the German *Thaler.* One hundred cents. GOLD 23.22 grains; alloy 2.58 grains; weight 25.8 grains. Coined 1849-1889. SILVER 371¼ grains; alloy 41¼ grains; weight 412½ grains. Coined 1794-1804, 1836-1838, 1840-1873, 1878-1904. Legal tender unlimited. The Mexican dollar contains 377.17 grains silver and 40.62 grains alloy. Spanish dollar the same. *D. F. Harris, Numismatist, Adams, N. Y.*

DOWNCAST. A ventilating shaft with descending current of air.

DRIFT. An underground passage driven horizontally on, or with, the vein.

DUMP. A deposit, or place of deposit, of waste rock or tailings.

ELVAN COURSE. A plutonic dike. *Lyell. Argall. Corn.*

EXPLOITATION. The active working of a mine as distinguished from prospecting.

FACE. Synonymous with breast.

FATHOM. A space 6 feet forward and 6 feet vertical with the width of the vein.

FAULT. A dislocation of strata. *Bainbridge. Yale.* The dislocation of a vein from its original position; a heave; a throw. *Von Cotta, 29.*

FEEDER. A small vein starting from some distant point and running into a main lode. It is practically synonymous with spur. *See Bainbridge 2.*

FELDSPAR. A vitreous crystalline constituent of granite, gneiss, porphyry and many other rocks.

FISSURE VEIN. A fissure or crack in the earth across its strata, filled with mineralized matter.

FLOAT. Loose quartz or ore detached from the vein and found below it.

FLOOR. The rock underlying a horizontal vein or deposit.

FLUME. A ditch carried in frame work on or above the surface.

FOOT WALL. The under wall of the vein.

FORFEITURE. The loss of possessory title as the result of abandonment or failure to comply with the conditions under which the title was held.

GAD. A small pointed wedge.

GALENA. A sulphide of lead; when not amorphous, is crystallized on the cubic system; when pure contains 86.6 per cent. lead, 13.4 per cent. sulphur. Carries silver in greatly varying quantities.

GALLERY. A level or drift; applied chiefly to collieries.

GANGUE. Crevice material; vein matter; the base material forming the matrix of the ore.

GASH VEIN. A vein which continues for practical purposes only a short distance below the sod, generally narrowing as it descends.

GEODE. A rounded nodule of stone containing a cavity studded with crystals or mineral matter; the cavity in such nodule.

GNEISS. A rock composed of the same constituents as granite, but foliated or stratified.

GOB FIRE. Fire in collieries produced by spontaneous combustion.

GOLD. A metallic element; bright yellow. Almost invariably found native associated with a variable percentage of silver. One ounce pure gold coined in U. S. dollars is worth $20.67.

GOSSAN. *See Iron Hat.*

GOUGE. A soft selvage; a clay streak found following a wall, or a slip or an ore measure.

GRANITE. A plutonic crystalline rock composed of feldspar, quartz and mica.

GRASS. The surface over a mine. *Corn.*

GRASS ROOTS. A term used where a working is started from, or worked up to, the surface.

GRAY COPPER. Tetrahedrite. An ore containing copper 15 to 42 per cent., combined with iron, zink, silver, mercury, arsenic and antimony. It varies in color, hardness and specific gravity.

GRUB STAKE. Provisioning a prospector on a bargain to share his discoveries.

HADE. The dip of the vein. *Corn.*

HANGING WALL. The upper wall of a vein.

HEADING. The breast or face of a working.

HEADINGS. The mass of gravel and pay dirt above the head of a sluice.

HEAVE. The horizontal dislocation of one lode by another.

HIGH EXPLOSIVES. Those of greater detonating force than black powder.

HORSE. A mass of country rock between the enclosing walls of a vein. To constitute a Horse, "It is necessary that the walls should converge about the mass below and at both ends, but the greatest known horses do not converge over head. The two walls coming to the surface are in some instances 1,000 feet apart." *Testimony of Clarence King in the Dives Case.*

HUDGE. An iron bucket for hoisting.

HUNGRY. Barren.

HYDRAULICS. That method of placer mining where the gravel is washed by a stream operating under hydraulic pressure.

I. D. B. Illicit Diamond Buyer. *Africa.*

IMPREGNATION. A metallic deposit having undetermined limits in no way sharply defined. *Von Cotta, 87.*

INCLINE DRIFT. A drift run at an incline to subserve the drainage. (2) A misnomer applied to a slope sunk upon a deposit having slight departure from the horizontal.

INFILTRATION THEORY. That which refers the origin of the ore to the deposit of mineral from water holding it in solution.

INJECTION THEORY. That which refers the origin of the ore to the introduction of igneous fluid.

IN PLACE. *In Situ.* Words used in Section 2329 of the U. S. Revised Statutes, qualifying the words "quartz or other rock," and to distinguish lode from placer claims. *See p. 162.*

IRON HAT. (*Eisen Hut.*) The outcrop of a lode, it being usually colored by the decomposition of the iron. *Von Cotta, 38.*

JIG. A machine for concentrating ore by means of sieves. *Corn.*

JUMP. To take forcible possession of a claim. (2) To relocate abandoned property.

KIBBLE. A kind of hoisting bucket. *Corn.*

LAGGING. Poles or small timbers used for spanning from one stull-piece to another, for cribbing mill-holes and for lining behind the timbers of a shaft.

LEAD. An objectionable form of the word lode.

LEAD. A metallic element, bluish white. Galena and carbonates are its most common ores.

LEDGE. A term in use on the Pacific slope synonymous with lode. *See p. 162.*

LENGTH. A certain portion of a vein when taken on a horizontal line on its course.

LEVEL. A drift along the vein; the word generally used where there are a series of drifts, as first level, second level, etc. *See Cambers v. Lowry, 5½ Pac. 816. 19 M. R. 539.*

LIFT. The space between two levels.

LITTLE GIANT. A jointed iron pipe and nozzle decreasing in diameter with the increase of the hydraulic pressure; used in placer mining.

LOCATION. The successive acts by which a claim is appropriated. (2) The claim itself.

LODE. An aggregation of mineral matter containing ores in fissures. *Von Cotta, 26.* A vein of metallic ore. A ledge. *Corn. See p. 161.* (A fault in the country which has become mineralized. *A. H. Green.*)

MAN HOLE. An opening just large enough to permit access between two workings.

MATRIX. (Of the lode.) The country rock in which the vein is found. (Of the ore.) The rock or earthy material inclosing the ore; the vein-stone. *Latin.*

MATTE. One of the products of matte or pyritic smelting. It consists either of ferrous mono-sulphide (FeS), or of cuprous sulphide. (Cu.2S), with ferrous mono-sulphide in varying proportion. *Franklin R. Carpenter, Ph. D. See Smelting.*

MERCURY. Quicksilver. A shining silver-white metal, liquid at temperature above —40 deg. Fahr. Boils at 669 deg. Fahr.

METALLURGY. The art of working metals, including smelting, refining, and parting them from the ores.

MICA. One of the constituents of granite. When separately crystallized is found in clear laminated plates.

MILL-HOLE. A passage left in the stope for throwing down rock or ore.

MILL-RUN. The returns of a lot of ore; the assay of ore in quantity as distinguished from a specimen assay.

MINE. Any excavation made for mineral. (2) An opened, as distinguished from an untouched deposit. (3) Underground as distinguished from superficial workings or quarries.

MINER'S INCH. There is an attempted statutory definition in Colorado R. S.* which is obscure and inexact. See also § 3330. Orifices constructed as this statute directs, will deliver through each square inch of opening, a quantity which varies from 1.4 to 1.7 cubic feet of water per minute. The custom among engineers is to take 1.6 cubic feet of water per minute as the equivalent of an inch.

"A miner's inch is the quantity of water which will escape from a reservoir through an aperture in its side 1 inch square, whose center is 6 inches below the constant level of the water and is equivalent to 1.626 cubic feet per minute. * * * The most common illustration of the miner's inch is a hole 1 inch square through an inch board." *Van Wagenen Manual Hydraulic Mining, p. 17.*

MINER'S RIGHT. The license to locate, used in Australia.

MOLYBDENITE. A sulphide of the metal Molybdenum; found in scales with metallic lustre closely resembling tin foil or gray copper; also in a granular form, showing steel blue flake crystals. Valuable and marketable when concentrated, as an alloy for high grade steel. *A. B. Frenzel.*

MONAZITE. A valuable sand obtained by sluicing, carrying thorium oxide used in manufacture of incandescent gas manties.

MOYLE. A drill or short bar sharpened to a point, used in cutting hitches and in broaching.

MUCKER. The man who fills the bucket or tram.

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*NOTE.—Section 3 of weights and measures chapter.

MUNDIC. Copper or iron pyrites. White Mundic is mispickel or arsenical pyrites.

NODULE. A small, rounded, stony concretion.

OPEN CUT. A longitudinal surface working not entering cover.

OPERATOR. One who works a mine either as owner or lessee.

ORE. The mechanical or chemical compounds of the metals with baser substances. The conventional divisions in the ore market are: DRY ORE: An ore which does not contain any lead, or less than 5 per cent. MILLING ORE: A dry ore that can be amalgamated or treated by leaching and other processes; usually these ores are low grades, free, or nearly so, from base metals. SHIPPING ORE: Such as is better adapted to smelting than any local treatment. Any ore of greater value when broken than the cost of freight and treatment. REFRACTORY ORE: An ore containing in quantities, arsenic, antimony or other base metals, which prevent economical treatment by usual and available processes. *W. J. Chamberlain.*

ORE IN SIGHT. Ore disclosed between drifts and shafts (or winzes) so that it can be measured, on the assumption that if exposed on four sides or three sides it presumably exists in the body of the stope the same as in the exposures. If exposed on two sides, it is counted as in sight to the extent of one-half the contents of the stope. Ore between drift, shaft and surface is ore in sight after allowance for depth of slide. Ore exposed on only one side is not ore in sight. *Kirby Thomas.*

ORE RESERVES. The ore body where exposed ready for stoping.

OUTCROP. That portion of a vein appearing at the surface.

OUTPUT. The gross product of a mine.

PAN. An iron basin used in gold prospecting.

PATCH. A small placer claim outside of the main gulch.

PATIO. A yard or court. The space where ore is mixed and amalgamated by tread of horses. *Sp.*

PATIO PROCESS. The Mexican method of amalgamation of silver ores.

PAY ROCK. The lode material in which the mineral or pay is found. *See Quartz.*

PAY STREAK. The ore body proper, or the seam of decomposed material which takes its place and preserves the continuity of the ore body.

PENT HOUSE. A shed or horizontal barricade across one end of a shaft, made of strong timbers loaded with rock to protect against any accidental fall from above. *Corn.*

PHONOLITE. A volcanic rock of porphyritic texture; the crystals in some cases so minute as to be imperceptible

unless magnified; thin slabs ring when struck, whence the name, literally, sounding stone.

PINCH. A narrow space where the walls come close together.

PIT. A shallow shaft. In Cornwall the working shaft or the whole mine is called the Pit.

PITCH. The dip of a lode.

PLACER. A deposit of gold not in place. Applied to all classes of gold deposit, including cement and channel claims, except lodes in place. For special meaning under Section 2329 U. S. Rev. St. *see p. 210.* Gold, Platinum, Tin, Gems and Monazite are the minerals won by this process.

PLAT. A small chamber on the side or sole of a level where it intersects a shaft, made to facilitate dumping. Where it is cut in the sole it is called a trip-plat. *Corn.*

POCKET. A detached ore body; a nest of ore.

POCKETY. A term applied to a mine where the pay ore occurs in small detached bodies with intervals of poor ore or barren material. The word implies a slur on the mine. *Paull v. Halferty, 9 M. R. 149; 63 Pa. 46.*

PORPHYRITIC GRANITE. A base of granite containing prominent crystals of feldspar.

PORPHYRY. A general term including such plutonic rocks as exhibit well formed crystals, usually of feldspar, in a finely granular or compact base of the same. *Gr.*

PROSPECTING. A search for deposits; applied both to the seeking for undiscovered veins and to the investigation of the value of known veins by exploration.

PYRITES. (White.) A sulphide of iron. (Yellow.) A sulphide of copper. Bright crystallized metallic looking and very common gold bearing ores usually low grade and spoken of in common parlance as the "iron." *Gr.*

QUARRY. Any open work in rock on a plan of excavating the entire mass, as distinguished from working a seam or vein by shafts or approaches under cover.

QUARTZ. Silica. A constituent of granite. The free gold of California being found in quartz, the word was applied to the gangue of such lodes and so to other forms of vein matter; until it is now used vaguely to mean the ore, the float, the gangue, or that part of the gangue which indicates the pay streak. In the Acts of Congress it is used with the word rock (quartz or other rock) in the sense of pay rock.

QUARTZITE. A metamorphosed sandstone; a rock containing usually about 98 per cent. silica with a small percentage of foreign materials, principally iron.

QUICKSILVER. *See Mercury.*

RAISE. A shaft or winze which has been worked from below.

RAND. Range of hills. *Dutch.*

REEF. An Australian term for lode or ledge.

REGULUS. The Alchemic term for "matte."

RHYOLITE. A name common to igneous rocks of a wavy texture indicative of movement or flowing when in a fluid state.

RIFFLE BLOCKS. Cross sections of timber set on the floor of a sluice with irregular spaces between, in which the gold settles. *American.*

ROB. To gut a mine; to work for the ore in sight without regard to supports, reserves or any future considerations.

ROCKER. *See Cradle.*

ROOF. A stratum or rock overlying a deposit, or flat vein. The top or back of any working.

ROYALTY. The dues to the lessor.

RUSTY. Oxidized. Ore coated with oxide. Applies to gold which will not easily amalgamate.

SCALE. A loosened fragment of rock threatening to break off and fall.

SCHIST. Crystalline or metamorphic rock with slaty structure; usually carrying mica, sometimes argillaceous.

SEGREGATIONS. All those aggregations of ore having irregular form but definite limits. They differ from beds and lodes by the irregularity of their form; from impregnations by their definite limits. *Von Cotta 81.*

SELVAGE. A lining; a gouge; a thin band of clay often found in the vein, upon the wall.

SET. Portion of ground taken by a tributer.

SHAFT. A pit sunk from the surface; an opening more or less perpendicular sunk on, or sunk to reach, the vein.

SHIFT. (1) A miner's turn or spell of work. *Webster.* Two shifts is the equivalent of 16 to 20 hours work, three shifts, 24 hours work, of one man. (2) All the miners who go on and off at the same hour are known as one shift. In large mines there are usually three, styled the day, night and graveyard shifts. *Benj. C. Catren, Jr.*

SILICA. In chemistry it means Silicon dioxide. Formula, $Si.O_2$. It is ordinary quartz. Between ore buyers and sellers everything not soluble in nitric and hydrochloric acids is counted as "silica"—a determination often manifestly unjust to the seller. *Franklin R. Carpenter, Ph. D.*

SILVER. A metallic element; the whitest of the metals. One oz. pure silver coined in U. S. dollars is worth $1.2929 gold.

SILVER GLANCE. An ore; when pure contains 87 per cent. silver and 13 per cent. sulphur.

SKIP. A square hoisting bucket running on guides, or in grooves.

SLICKENSIDES. Smooth, polished portions of the wall or of some vertical plane in the lode, caused by friction. It may occur on the ore itself. *German.*

SLIDE. (1) One kind of fault—the vertical dislocation of a lode. (2) The mass of loose rock overlying either lode or country.

SLOPE. An opening driven upon the inclination of the vein.

SLUICE. A series of boxes set in line and floored with riffle blocks to catch the gold in a placer mine.

SMELTING. The reduction of metals from their ores in furnaces. It is a form of the word *melt*. In smelting the ore is melted. In other processes it is roasted. MATTE SMELTING. A process of smelting where the values in the ores are collected in an iron and copper sulphide (*regulus*) technically called "matte." When iron and copper pyrites are added to the charge for their fuel value as well as their matte-forming properties, the process is called "pyritic smelting." *Franklin R. Carpenter, Ph. D.*

SOLE. The floor of a horizontal working.

SOLLAR. Any platform or wooden floor or covering in a working. *Corn.*

SOUGH. A drain. *Eng.*

SPAR. A general term applied to rock with distinct cleavage and lustre.

SPELTER. Commercial zink.

SPILING. Timbering used in quicksand or loose ground where lathes are driven behind timbers and kept flush with the heading.

SPUR. A branch or off-shoot from a larger vein.

STAMPS. Machine for crushing ores by vertical stroke.

STOPE. The working above or below a level where the mass of the ore body is broken. *Corn.*

STOPING. The act of breaking the ore above or below a level; when done from the back of the drift it is called overhand or back stoping; when from the sole it is underhand stoping.

STRATUM. A bed of rock or earth of any kind. *Dana.* The plural is *strata*.

STRIKE. The extension of a lode or deposit on a horizontal line. *Von Cotta 19.* Synonymous with *trend* and *course*.

STULLS. Cross timbers at the foot of a stope. Any extra heavy timbers.

SUBLIMATION THEORY. That which refers the filling of fissures to material deposited from ascending steam, or by condensation from a gaseous condition.

SULPHATE. The combination of a metal with both sulphur and oxygen.

SULPHIDE. The chemical union of sulphur with a metal.

SULPHUR. A non-metallic element. Yellow, fusible, brittle, insoluble; except Oxygen, the most common base combining element in metallic ores, such as Pyrites. As a commercial product most commonly mined from old volcanic craters. Greatest production, Sicily. Largest deposits in U. S., Louisiana; Black Rock, Utah; Sun Light basin, Big Horn County, Wyo. *T. S. Todd*, Importer, 25 Broad street, N. Y.

SULPHURET. A sulphide. Sulphide is the more recent and approved term.

SUMP. The extension of a shaft, forming a pit for the collection of water. *Corn.*

SYLVANITE. A gold-silver-tellurium combination. Pure steel gray to silver white, inclining to pale yellow. Gold 24.5; silver 13.4; tellurium 62.1. Usually in fine grains or crystals. *A. B. Frenzel.*

SYNDICATE. An association or council of persons; in use since the civil war to designate any combination formed to carry out a large financial enterprise.

TACKLE. The windlass, rope and bucket. *Corn.*

TAILINGS. The refuse discharged from the tail end of a sluice, or washed from any sort of placer working. The waste rock left after any process of ore separation.

TELLURIUM. A silver white, brittle substance, combining with many metals to form tellurides in the same manner as sulphur forms sulphides.

TIN. A soft, malleable, white metal. Mined in Cornwall since prehistoric times. Used commercially as a coating to thin sheets of iron, and as a factor in many alloys.

TRIBUTERS. Miners who work a *set*, or piece of ground, taking the proceeds as wages, after royalty deducted, but who work under direction of the owners and hold no possession or title as lessees.

TROUBLE. A fault.

TUNDRA. The moss, or scrub-covered, regions of the Arctic.

TUNGSTEN. (Wolfram.) A hard, heavy, grayish white metal, that fuses with great difficulty. A steel hardening alloy. Its ores are Scheelite, Huebnerite and Wolframite, all of heavy specific gravity. Wolframite is similar to iron in appearance, but when scratched shows reddish brown. Huebnerite shows reddish brown, straight and fan-shaped crystals. Matrix of both, usually white quartz or buff-colored quartzite. *A. B. Frenzel.*

TUNNEL. A horizontal excavation starting at the surface and driven across the country for discovery or working purposes.

TUT WORK. Work paid for by the foot as distinguished from tribute work.

UPCAST. A ventilating shaft where the air ascends.

URANIUM. This metal occurs in the mineral uraniuite or pitch blende as an oxide; also, associated with vanadium in the mineral carnotite. The color of pitch blende varies from gray to black; that of the carnotite is lemon yellow. Radium occurs in these ores and may be prepared from them. *Wm. P. Headden.*

VANADIUM. This metal occurs widely distributed, but is rarely met with in large quantities. The largest known deposit occurs near Placerville on the San Miguel River in Colorado, in a sandstone to which it gives a green color. Vanadium alloys with iron, forming ferro-vanadium, used in making certain high grade steels. It is best

known in commerce as vanadic acid, V.2.O.5. *Wm. P. Headden.*

VEINS. Aggregations of mineral matter in fissures of rocks. *Von Cotta 26; Bainbridge 2.* The word vein has a broader scope than lode, including non-metallic beds. *See p. 161.* It is also applied, in working, to smaller seams threading the greater deposit. *See Vena and Veta.*

VENA. A small vein or the branches of the veta, or main vein. *Span.*

VETA. A main vein. VETA MADRE. The mother vein. *Span.*

VUG. A cavity in the ore or rock.

WALL. The plane of the country where it touches the side of the vein, when used in reference to lodes. The side of a level or drift, when used with reference to the workings. *See p. 188.*

WHEAL. A pit or hole in the ground. A mine. The names of most mines in Cornwall are preceded by the word *Wheal.* Old form *Huel. Corn.*

WHIM. A machine for raising the bucket by means of a revolving drum.

WHIP. An apparatus for raising the bucket with rope and pulleys, by horse power on a straight drive.

WINZE. A shaft sunk from a level; not necessarily connecting two levels.

ZINK. A metallic element; bluish white; generally found as a sulphide (blende) or as a carbonate (calamine).

TABLE OF SYMBOLS, ATOMIC WEIGHTS, SPECIFIC GRAVITY AND FUSING POINTS.

	Symbol.	Atomic Weight.	Specific Gravity.	Fusing Pt. (Fahr.)
Aluminum	Al	27.04	2.5	1562°
Antimony	Sb	119.6	6.7	826
Bismuth	Bi	206.5	9.8	511
Cobalt	Co	58.6	8.95	2732
Copper	Cu	63.2	8.9	1932
Gold	Au	196.2	19.34	2097
Iron	Fe	55.9	7.	2894
Lead	Pb	206.4	11.3	617
Manganese	Mn	54.8	7.2	2822
Mercury	Hg	199.8	13.6	—37.9 (Freezes)
Molybdenum	Mo	95.9	8.6	Infusible in *O. H. flame
Nickel	Ni	58.6	8.8	2642
Platinum	Pt	194.3	21.5	3227
Silver	Ag	107.7	10.53	1749
Silica	SiO_2	60.0	2.6	Fuses in O. H. flame
Sulphur	S	32.0	2.05	240
Tellurium	Te	127.6	6.65	847
Tin	Sn	118.2	7.2	442
Tungsten	W	183.6	19.1	Fuses in O. H. flame
Uranium	U	238.5	18.6	Not known between red and white heat
Vanadium	V	51.2	5.5	Infusible
Zink	Zn	64.9	8.9	801

*O. H. Flame has temperature of over 3000° F.

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We desire to express obligations for courteous suggestions and information as to the local law and custom in their respective States, to the following attorneys: *D. D. Williams*, Boise, Idaho; *Cullen, Day & Cullen*, Helena, Montana; *Corlett Downey*, Laramie, Wyoming; *Willis B. Herr*, Seattle, Washington; *C. C. Dey*, Salt Lake City, Utah; *Curtis H. Lindley*, of San Francisco, California; *Hon. Jas. W. Fowler*, Deadwood, South Dakota; *J. C. Flanders*, Portland, Oregon; *J. B. Woodward*, Phœnix, Arizona; *W. E. So Relle*, Goldfield, Nevada, and to *Horace F. Clark*, of Washington, D. C., for points in Land Office practice.

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